No. 7223

APPENDIX OF APPELLANT

FILED
JOHN T. FEY, Clerk

In the
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 7452

FRED FRANKEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

THOMAS A. GOODWIN,
Attorney at Law,
800 Riley Law Building,
Wheeling, West Virginia

C. LEE SPILLERS,
Attorney at Law,
800 Riley Law Building
Wheeling, West Virginia

FILED

INDEX TO APPENDIX

	Page
Judgment	1
Indictment	3
Motion of Fred Franken, Defendant to Dismiss the Indictment	13
Motion of Fred Franken, for Continuance	15
Motion of Defendant Fred Franken, for Discovery and Inspection	21
Motion of Defendant Fred Franken, for Bill of Particulars	22
Rulings on Motions	25
Excerpts from Testimony	25
Paul Albert DeArdo	26-74, 96-99
James A. Whitehead	74-95, 181-183
Fred Franken	99-181
Charge to Jury	183

In the
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 7452

FRED FRANKEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

APPENDIX OF APPELLANT

[Caption Omitted]

JUDGMENT

This 26th day of April, 1957, came the United States of America by Albert M. Morgan, United States Attorney, and came as well the defendant, Fred Franken, in person, and by C. Lee Spillers, his counsel.

And the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the court, it is ordered that the defendant be committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of THREE (3) YEARS and that he pay a fine of THREE THOUSAND ($3,000.00) DOLLARS without costs. And it is further ordered that after the expiration of the prison sentence herein that the said defendant should stand committed as aforesaid until the fine of THREE THOUSAND ($3,000.00) DOLLARS is paid or he be otherwise released according to the law.

Thereupon the said defendant tendered for filing a Notice of Appeal from the judgment rendered on this day to the United States Court of Appeals for the Fourth Circuit, which Notice of Appeal is ordered to be filed.

Thereupon the said defendant asked leave to be admitted to bail pending such an appeal, which motion is granted, and bond is fixed in the penalty of FOUR THOUSAND ($4,000.00) DOLLARS. Thereupon the said defendant tendered an appeal bond in the penalty aforesaid conditioned as the law provides and approved by the clerk of this court and the said defendant is released in accordance with the conditions set out in the aforesaid mentioned appeal bond.

ENTERED:

H. S. BOREMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

No. 6936

United States of America

v.

Fred Franken, Paul Albert DeArdo and James A. Whitehead

(Title 18, Section 371, USC)

THE GRAND JURY CHARGES:

1. The following named persons, hereinafter referred to as defendants, are hereby indicted and made defendants herein, FRED FRANKEN, PAUL ALBERT DeARDO and JAMES A. WHITEHEAD.

2. That from on or about the.....day of November, 1954, up to and including the.....day of August, 1955, and at all times between said dates, in the Northern District of West Virginia and elsewhere, the defendants named in paragraph 1 of this indictment did unlawfully conspire, combine, confederate, arrange and agree together, each with the other and with each other, and with divers other persons to the Grand Jurors unknown, to commit certain offenses against the United States, to wit, to unlawfully transport and cause to be transported in interstate commerce certain goods, wares and merchan-

dise of the value of $5,000.00 and more, knowing the same to have been stolen, in violation of Title 18, Section 2314, United States Code, and to sell and dispose of and to cause to be sold and disposed of, said certain goods, wares and merchandise of the value of $5,000.00 and more, transported in and constituting interstate commerce, knowing the same to have been stolen, in violation of Title 18, Section 2315, United States Code, and, in particular, that the said defendants did unlawfully conspire, combine, confederate, arrange and agree together, each with the other and with each other, and with divers other persons to the Grand Jurors unknown, that during the said period of time said defendants would unlawfully transport and cause to be transported in interstate commerce certain prime steel in mill width coils of the value of $5,000.00 and more, said steel then and there being the property of the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and having been theretofore stolen by the said defendants, and taken by fraud with intent to steal the same, from the plant of the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, in the State of West Virginia, and in the Northern District of the State of West Virginia, to Farrell and to Sharon in the State of Pennsylvania, and to Chicago in the State of Illinois, and to divers other places outside the boundaries of the State of West Virginia to the Grand Jurors unknown, they, the said defendants and each of them, then and there well knowing said steel to have been stolen; and that they, the said defendants and each of them, during the period of time aforesaid, would sell and dispose of and cause to be sold and disposed of said steel, the same having theretofore been the property of and stolen from the Lorentzen Hardware Mfg. Corp., a

corporation, at Weirton, West Virginia, as aforesaid, and transported in and constituting interstate commerce from Weirton, in the State of West Virginia, in the Northern District of the State of West Virginia, to Farrell and to Sharon, in the State of Pennsylvania, and to Chicago, in the State of Illinois, and to divers other places outside the boundaries of the State of West Virginia to the Grand Jurors unknown, they, the said defendants and each of them, then and there well knowing said steel to have been stolen and thereafter transported in and constituting interstate commerce, as hereinbefore set forth.

3. That in furtherance of said unlawful conspiracy, confederation, combination and agreement, the said defendants and each of them, for the purpose of effecting the objects of said conspiracy as charged, and well knowing the premises did on the several dates and at the places hereinafter mentioned do and commit the following overt acts, in violation of Title 18, Section 371, United States Code, that is to say:

OVERT ACT NO. 1

That on or about the 11th day of November, 1954, Paul Albert DeArdo and James A. Whitehead stole and removed 42,650 pounds of steel from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel on a motor truck driven by R. W. Oliphant, theretofore arranged for by Fred Franken with the Aetna Freight Lines, Columbiana, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in interstate commerce from Weirton,

West Virginia, to Farrell, Pennsylvania, by said motor carrier, and delivered and sold to the Sharonsteel Products Division of Sharon Steel Corporation, the consignee thereof, by Fred Franken.

OVERT ACT NO. 2

That on or about the .....day of November, 1955, after the occurrence in Overt Act No. 1, Fred Franken met with Paul Albert DeArdo at the plant of the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and gave Paul Albert DeArdo one thousand dollars in currency and promised Paul Albert DeArdo another thousand dollars for steel per their agreement; and thereafter Paul Albert DeArdo gave James A. Whitehead about three hundred dollars in currency, of the one thousand dollars Paul Albert DeArdo had received from Fred Franken for the first shipment of steel Paul Albert DeArdo and James A. Whitehead had stolen from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and Fred Franken had sold.

OVERT ACT NO. 3

That on or about the 6th day of January, 1955, Paul Albert DeArdo and James A. Whitehead stole and removed six coils, being 33,565 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel coils on a motor truck driven by John Obney, theretofore arranged for by Fred Franken with the Aetna

Freight Lines, Columbiana, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in interstate commerce from Weirton, West Virginia, to Farrell, Pennsylvania, by said motor carrier, and delivered and sold to the Sharonsteel Products Division of Sharon Steel Corporation, the consignee thereof, by Fred Franken.

OVERT ACT NO. 4

That on or about the 8th day of January, 1955, Paul Albert DeArdo and James A. Whitehead stole and removed seven coils of steel, being 34,630 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel coils on a motor truck driven by Earl Wilson, theretofore arranged for by Fred Franken with the Aetna Freight Lines, Columbiana, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in interstate commerce from Weirton, West Virginia, to Farrell, Pennsylvania, by said motor carrier, and delivered and sold to the Sharonsteel Products Division of Sharon Steel Corporation, the consignee thereof, by Fred Franken.

OVERT ACT NO. 5

That on or about the 21st day of February, 1955, Paul Albert DeArdo and James A. Whitehead stole and removed six coils, being 34,540 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing

all identification markings therefrom, loaded said steel coils on a motor truck driven by John Obney, theretofore arranged for by Fred Franken with the Aetna Freight Lines, Columbiana, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in interstate commerce, from Weirton, West Virginia, to Farrell, Pennsylvania, by said motor carrier, and delivered and sold to the Sharonsteel Products Division of Sharon Steel Corporation, the consignee thereof, by Fred Franken.

OVERT ACT NO. 6

That on or about the 26th day of February, 1955, Paul Albert DeArdo and James A. Whitehead stole and removed seven coils, being 35,879 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel coils on a motor truck driven by Merrill Crum, theretofore arranged for by Fred Franken with the Aetna Freight Lines, Columbiana, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in interstate commerce from Weirton, West Virginia, to Farrell, Pennsylvania, by said motor carrier, and delivered and sold to the Sharonsteel Products Division of Sharon Steel Corporation, the consignee thereof, by Fred Franken:

OVERT ACT NO. 7

That on or about the 3rd day of May, 1955, Paul Albert DeArdo and James A. Whitehead stole and re-

moved fifteen coils, being 86,894 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel coils on two motor trucks, one driven by Ralph Carrocee carrying eight coils of steel weighing 45,869 pounds, and the other driven by Earl Denman carrying seven coils of steel weighing 41,025 pounds, theretofore arranged for by Fred Franken with the McCullough Transfer Company, Youngstown, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in interstate commerce from Weirton, West Virginia, to Sharon, Pennsylvania, by said motor carriers, and delivered and sold to the Sharonsteel Products Division of Sharon Steel Corporation.

OVERT ACT NO. 8

That on or about the 18th day of June, 1955, Paul Albert DeArdo and James A. Whitehead stole and removed fifteen coils, being 82,962 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel coils on two motor trucks, one driven by Rover Johnson carrying eight coils of steel weighing 44,212 pounds, and the other driven by.....Beecher carrying seven coils of steel weighing 38,750 pounds, theretofore arranged for by Fred Franken with the McCullough Transfer Company, Youngstown, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in inter-

state commerce from Weirton, West Virginia, to Sharon, Pennsylvania, by said motor carriers, and delivered and sold to the Sharonsteel Products Division of Sharon Steel Corporation, the consignee thereof, by Fred Franken.

OVERT ACT NO. 9

That on or about the.....day of July, 1955, per arrangements theretofore made between them therefor, James A. Whitehead met Fred Franken at a point on the highway located about one-half mile from the Lorentzen Hardware Mfg. Corp., a corporation, plant at Weirton, West Virginia, and Fred Franken handed James A. Whitehead $500.00 in currency for Paul Albert DeArdo, which amount of money James A. Whitehead wired to Paul Albert DeArdo, care of Western Union, Fort Lauderdale, Florida.

OVERT ACT NO. 10

That on or about the 30th day of July, 1955, Paul Albert DeArdo and James A. Whitehead stole and removed fourteen coils, being 78,995 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel coils on two motor trucks, one driven by Gil Dankmeyer carrying eight coils of steel weighing 45,800 pounds, and the other driven by Glenwood Miller carrying six coils of steel weighing 33,195 pounds, theretofore arranged for by Fred Franken with the Aetna Freight Lines, Columbiana, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the con-

signor thereof, and transported by him in interstate commerce from Weirton, West Virginia, to Chicago, Illinois, by said motor carriers, and delivered and sold to Sidney Borenstein and Arnold Borenstein, partners, doing business as Superior Steel Supply, care of the United Flat Roll Company, Chicago, Illinois, the consignee thereof, by Fred Franken.

OVERT ACT NO. 11

That on or about the 20th day of August, 1955, Paul Albert DeArdo, James A. Whitehead and one Thomas Fabien stole and removed eight coils, being 45,500 pounds of mill width prime steel, from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, and, after removing all identification markings therefrom, loaded said steel coils on a motor truck driven by Galan Martz, theretofore arranged for by Fred Franken with the Aetna Freight Lines, Columbiana, Ohio, and said steel having been theretofore stolen was shipped by Fred Franken, the consignor thereof, and transported by him in interstate commerce from Weirton, West Virginia, to Chicago, Illinois, by said motor carrier, and delivered and sold to Sidney Borenstein and Arnold Borenstein, partners, doing business as Superior Steel Service, care of Nottingham Steel Company, Chicago, Illinois, the consignee thereof, by Fred Franken.

OVERT ACT NO. 12

That during the period of time from the .....day of November, 1954, to the ..... day of June, 1955, and on various dates during said period of time, Fred Franken

sold to the Sharonsteel Products Division of Sharon Steel Corporation, at Sharon and Farrell, Pennsylvania, steel aggregating 351,120 pounds, which steel had theretofore been stolen from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, by Paul Albert DeArdo and James A. Whitehead and transported said steel in interstate commerce from Weirton, West Virginia, to Sharon and Farrell, Pennsylvania, and for said sales of steel Fred Franken received from said the Sharonsteel Products Division of Sharon Steel Corporation, sums totaling $19,175.00.

OVERT ACT NO. 13

That during the period of time from the..... day of July, 1955, to the..... day of August, 1955, and various dates during said period of time Fred Franken sold to Sidney Borenstein and Arnold Borenstein, partners, doing business as Superior Steel Service at Chicago, Illinois, steel aggregating 124,495 pounds, which steel had been theretofore stolen from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, by Paul Albert DeArdo and James A. Whitehead, and transported said steel in interstate commerce from Weirton, West Virginia, to Chicago, Illinois, and for said sales of steel Fred Franken received from said Superior Steel Service sums totalling $9,340.88.

OVERT ACT NO. 14

That during the period of time from the.....day of November, 1954, to the.....day of August, 1955, and on various dates during said period of time, at Weirton,

West Virginia, Fred Franken gave, paid and delivered to Paul Albert DeArdo, or for him, sums of money totalling $8,500.00, of which amount Paul Albert DeArdo gave, paid and delivered to James A. Whitehead sums of money totalling $1,500.00 for steel which had during said period been stolen from the Lorentzen Hardware Mfg. Corp., a corporation, at Weirton, West Virginia, by Paul Albert DeArdo and James A. Whitehead.

A True Bill:

_____

Foreman

_____

United States Attorney

[Caption Omitted]

MOTION OF FRED FRANKEN, DEFENDANT, TO DISMISS THE INDICTMENT.

The defendant, Fred Franken, by his Attorneys, Goodwin, Spillers & Mead, of Wheeling, West Virginia, moves that the indictment be dismissed on the following grounds:

1. The indictment for conspiracy against the three defendants is not sustained by the overt acts alleged. The

overt acts show nine distinct and independent occurrences or conspiracies. Overt Act Number 11 shows an independent conspiracy including one, Thomas Fabien, who is not a defendant in this indictment.

(2) The overt acts alleged show nine distinct, independent and separate conspiracies ranging in time from November, 1954, to the 20th of August, 1955, and some of said occurrences being more than two months apart in time.

(3) The United States must legally indict on each separate offense under the circumstances recited in this indictment.

(4) The value of the merch dise in all of the offenses alleged cannot be totalled to sustain the charge against the defendant, Fred Franken, but the value of the merchandise in each individual transaction can only be used to sustain the individual charge.

(5) The indictment, in the form it is drawn, alleges a number of separate and independent offenses, which could only be charged by separate indictments.

(6) The indictment shows on its face that two of the defendants stole the steel and that the transportation of the steel was made by recognized freight lines arranged by the defendant, Fred Franken, but the overt acts show that the defendant, Fred Franken, had nothing to do with stealing the steel, but that he purchased the same and paid for the same.

(7) Each overt act alleged shows a conspiracy between DeArdo and Whitehead to steal said steel, but any sale

or transportation of the steel was arranged solely by the other defendant, Fred Franken.

(8) The indictment is vague and fails to allege sufficient facts. It fails to allege the relationship between DeArdo and Whitehead and the company Lorentzen Hardware Mfg. Corporation. It fails to allege how the steel was stolen, and on the contrary shows it was loaded at the plant in Weirton, West Virginia. The indictment does not show that Lorentzen Hardware Mfg. Corporation did not eventually receive the proceeds of sale from DeArdo.

(9) The indictment does not state facts against the defendant, Fred Franken, sufficient to constitute an offense against the United States.

FRED FRANKEN

By Goodwin, Spillers & Mead
His Attorneys

[Caption Omitted]

MOTION OF DEFENDANT, FRED FRANKEN, FOR A CONTINUANCE

The defendant, Fred Franken, by his Attorneys, Goodwin, Spillers & Mead, moves the Court to continue and postpone the trial of this case to some later date to enable the defendant to prepare for the trial for the following reasons:

The defendant, Fred J. Franken, resides at 253 Lora Avenue, Youngstown, Ohio, and has resided in Youngstown, Ohio, since 1911. Said defendant has a wife and five children, one now recently deceased, and has a number of grandchildren.

For several years said defendant has been a buyer of steel and since 1953 has been the regular buyer of steel for the Harmony Tool and Dye Company, at Mingo Junction, Ohio, but has purchased steel for numerous other companies.

On December 12, 1956, the Grand Jury at Wheeling, West Virginia, returned an indictment against the defendant in this case. The defendant learned about said indictment on December 14, 1956, and immediately consulted his Attorney, James M. Modarelli, of Youngstown, Ohio. Attorney Modarelli, on December 17, 1956, wrote a letter to Albert M. Morgan, U. S. Attorney in this case, in Fairmont, West Virginia, requesting an interview for Mr. Franken and Attorney Modarelli. Albert M. Morgan, Esquire, U. S. Attorney, wrote Attorney James M. Modarelli, of Youngstown, Ohio, on December 19, 1956, advising him that he would be in his office in Fairmont for such interview on January 2, 3 and 4, 1957, and could see Mr. Modarelli and Mr. Franken at their convenience on either of said dates. U. S. Attorney, Albert M. Morgan, also forwarded with said letter a copy of the indictment returned by the Grand Jury, at Wheeling, on December 12, 1956.

The defendant, Fred J. Franken, and Attorney Modarelli, of Youngstown, Ohio, made a trip to Fairmont, West Virginia, on January 4, 1957, and had said interview

with U. S. Attorney, Albert M. Morgan. The defendant, Fred Franken immediately consulted Attorney Wesley R. Tinker, Jr., of Wheeling, West Virginia, and on January 7, 1957, was arraigned in Court and pleaded not guilty. At that time he advised the Court that he was negotiating with an Attorney to represent him, that Attorney being Wesley R. Tinker, Jr., of Wheeling, West Virginia.

On January 9, 1957, the defendant, Fred J. Franken, received a letter from Albert M. Morgan, U. S. Attorney, advising him that his case would be the first trial set by Judge Boreman for January 21, 1957. This letter was not received until January 10, 1957. On January 13, 1957, Attorney Charles McCamic, of Wheeling, West Virginia, died suddenly and Attorney Charles McCamic was the father-in-law of Attorney Wesley R. Tinker, Jr. Thereafter Attorney Tinker advised the defendant that by reason of a death in his family he would not be able to represent the defendant and could not appear for him at the trial of this case.

The defendant, Fred J. Franken, thereupon made an effort to employ other counsel and immediately communicated with Attorney C. Lee Spillers, of Wheeling, West Virginia, and made an appointment for a conference. The defendant made a trip to Wheeling, West Virginia, on January 16, 1957, and at that time being unable to confer with C. Lee Spillers, conferred with Russell B. Goodwin concerning his case and arrangements for the firm of Goodwin, Spillers & Mead to represent him in this case. The defendant was required to

return to Youngstown, Ohio, but on January 17, 1957, at about 1:30 P.M. by telephone, employed the law firm of Goodwin, Spillers & Mead in Wheeling, West Virginia, to represent him in this case.

The Court will observe from the indictment that this defendant is charged with a conspiracy with two other men involving at least nine separate and independent purchases of steel which took place from the 11th day of November, 1954, until the 20th day of August, 1955. These various purchases involved the transportation of steel from Weirton, West Virginia, to Sharon, Pennsylvania, and to Chicago, Illinois. The steel was purchased from Paul Albert DeArdo, whom the defendant understood to be Plant Manager or Superintendent and in charge of sales at the plant of the Lorentzen Hardware Mfg. Corporation, in Weirton, West Virginia. All of the purchases were made at said plant.

The transportation of the steel purchased was made by Aetna Freight Lines, Columbiana, Ohio, a common carrier of steel and by McCullough Transfer Company, Youngstown, Ohio, also a common carrier of steel.

The steel was sold to Sharon Steel Corporation, Sharon, Pennsylvania, and to the Superior Steel Supply, in Chicago, Illinois.

The indictment charges that the identification markings were removed from said steel and that this defendant was the consignee of said shipments. As a matter of fact, this defendant was never present when any of said shipments were made or when said steel was loaded at the

plant of Lorentzen Hardware Mfg. Corporation, in Weirton, West Virginia.

Since the defendant has learned of this indictment, he has been very diligent in an effort to obtain the facts and to employ counsel, but it is impossible for him to obtain the necessary facts, interview the necessary witnesses and make the necessary preparations to defend himself on such short notice, if a trial is held on January 21, or 22, 1956, or in any close proximity to those dates.

It is necessary for this defendant to investigate and review the records in all nine of these sales alleged in the indictment. At least one sale was made while the defendant was in Chicago, Illinois, and all communication and records of said sale would be reflected in the telephone records of Lorentzen Hardware Mfg. Corporation, at Weirton, West Virginia. Numerous employees of Lorentzen Hardware Mfg. Corporation were involved in making said shipments and loading said steel which was purchased by the defendant. The defendant is informed that numerous other purchases of a similar nature were made by other steel buyers and numerous other shipments of steel made from the plant of Lorentzen Hardware Mfg. Corporation by the other defendants in this case, Paul Albert DeArdo and James A. Whitehead.

If the necessary witnesses cannot be obtained, their depositions may have to be taken. The defendant is entitled to have and will require certain discovery of facts and inspection of documents from the Attorney for the Government as permitted by Rule 16 Federal Rules of Criminal Procedure. This defendant has already filed

a Motion for a Bill of Particulars to obtain necessary information. This defendant does not know the names of or have the addresses of various employees of Lorentzen Hardware Mfg. Corporation involved in these transactions nor the names and addresses of other witnesses which it will be necessary for him to subpoena in order to obtain a fair trial of this case and to present his defenses.

The defendant is also advised that the indictment found against him by the Grand Jury involves at least nine separate and distinct transactions which may require separate and independent indictments rather than one indictment joining all of said alleged defenses. Overt Act No. 11 alleges an additional conspirator by the name of Thomas Fabien, whom this defendant never knew or heard of. The defendant, James A. Whitehead, is almost unknown to this defendant. The defendant, Paul Albert DeArdo, was and is known to this defendant as the man in charge of the plant of Lorentzen Hardware Mfg. Corporation, in Weirton, West Virginia, with full power and authority to handle all transactions with that company at that plant. This defendant further says that numerous witnesses in West Virginia, Ohio, Pennsylvania and in Chicago, Illinois, are necessary and material witnesses to enable this defendant to prove his innocence in this case and to present the true facts necessary for his defense.

The defendant, Fred J. Franken, therefore, respectfully moves and requests the Court to continue the trial of this action until sometime after the opening of the next regular April 1957 Term of this Court on April 16, 1957. If said continuance is granted, this defendant will

proceed immediately and diligently to obtain the necessary witnesses, records and documents to enable the Government, the Defendant and the Court to try this case during the April 1957 Term.

Defendant

[Notary Seal Omitted]

[Caption Omitted]

MOTION OF DEFENDANT FRED FRANKEN, FOR DISCOVERY AND INSPECTION.

The defendant, Fred Franken, by his Attorneys, Goodwin, Spillers & Mead, moves the Court to require the Attorney for the Government in this case, pursuant to Rule 16 of the Federal Rules of Criminal Procedure to permit the defendant to inspect and copy the following documents in possession of the Attorney for the Government:

1. The signed statements of the defendants Paul Albert DeArdo and James A. Whitehead.

2. All papers and documents seized from any of the defendants or obtained by process that are related to the conspiracy charged in the indictment.

3. Receipts, telegrams, Bills of Lading and other documents signed by any of the defendants relative to the charges in the indictment.

4. All papers, statements and documents turned over and delivered to the Attorney for the Government by Lorentzen Hardware Mfg. Corporation, & its officers.

5. All papers, statements and documents turned over and delivered to the Attorney for the Government by employees of Lorentzen Hardware Mfg. Corporation, Sharonsteel Products Division of Sharon Steel Corporation and Superior Steel Supply of Chicago, Illinois.

Fred Franken, defendant

By Goodwin Spellers & Mead
His Attorneys.

[Caption Omitted]

MOTION OF DEFENDANT FRED FRANKEN, FOR BILL OF PARTICULARS.

The defendant, Fred Franken, by his Attorneys, Goodwin, Spillers & Mead, moves the Court to require the United States of America to file a Bill of Particulars pursuant to Rule 7 F of the Federal Rules of Criminal Procedure giving this defendant more definite information as follows:

1. What was the official position and title of Paul Albert DeArdo with Lorentzen Hardware Mfg. Corporation, a corporation.

2. Did Paul Albert DeArdo have authority to make sales of steel coil and other products of that company.

3. What was the official position and title of James A. Whitehead with Lorentzen Hardware Mfg. Corporation, a corporation.

4. Did James A. Whitehead have authority to make sales of steel coil and other products of that company.

5. What was the official position and title of Thomas Fabien with Lorentzen Hardware Mfg. Corporation, a corporation.

6. Did Thomas Fabien have authority to make sales of steel coil and other products of that company.

7. Give the names and addresses of the employees of Lorentzen Hardware Mfg. Corporation, a corporation, who loaded the various trucks with steel purchased by the defendant, Fred Franken.

8. Who signed the bill of lading on each shipment and if said bills of lading are available permit this defendant to examine them.

9. What is the name of the employee or employees of Lorentzen Hardware Mfg. Corporation who receive telephone calls and visitors at the plant of this company.

10. When did the officials of Lorentzen Hardware Mfg. Corporation first learn that Paul Albert DeArdo and James A. Whitehead were stealing or had stolen any steel from said company.

11. Is it the intent of the indictment to charge Fred Franken with a conspiracy to steal the steel or merely with a conspiracy to sell the steel and unlawfully transport it in Interstate Commerce.

12. Was the steel sold to Fred Franken and by him sold to others or was the sale direct to the companies receiving the same.

13. Was the defendant, Fred Franken, at any time present when the steel was loaded and shipped.

14. Who removed identification markings from the steel.

15. What was the market value of the various shipments of steel.

16. Was the steel itself stolen or was the proceeds of sale embezzled.

FRED FRANKEN

By His Attorneys

EXCERPTS FROM TESTIMONY*

(tr 15-T). The motion to dismiss the indictment will be overruled.

The motion of the defendant Franken for discovery and inspection will be overruled.

For the reasons stated earlier this morning the motion for a continuance will be overruled.

As to the motion for a bill of particulars, some of the information has been furnished here at the bar of the court, some of the information that seemed to be particularly important to defense counsel. Is it your desire, Mr. Spillers, that the information already furnished at the bar of the court be put in a formal bill of particulars?

MR. SPILLERS: No, Your Honor, I wouldn't require that.

THE COURT: Now then, you have asked the name of the employee or employees of Lorentzen Hardware Manufacturing Company who received telephone calls and visitors at the plant of this company. That's under item 9. Do you have that information, Mr. Morgan?

MR. MORGAN: The name of the lady? Just a

---

*PRINTERS NOTE — "(Tr.—)" refers to Reporters Transcript pages. They are all set flush left for convenince since may be a few words off as to actual beginning.

minute, Your Honor, I have that information. She now lives in California and she is not subpoenaed in this case. Mrs. Edith Baxter, 423 Nadina, Bayside Manor, Millbrae, California. She received some telphone calls. * * * (tr 26) PAUL ALBERT DeARDO, having been first duly sworn as a witness, thereupon testified as follows:

DIRECT EXAMINATION

BY MR. MORGAN:

Q You have stated your name as Paul Albert DeArdo?

A That's right.

Q Are you the same Paul Albert DeArdo who is a defendant in Indictment No. 6936, United States v. Fred Franken, Paul Albert DeArdo and James A. Whitehead?

A Yes, sir.

Q What is your age?

A Thirty-six, sir.

Q And where do you live?

A 331 New York Boulevard, Weirton, West Virginia.

Q And what is your occupation presently?

A Soldier, sir.

Q And how long has that been your occupation?

A Approximately a month and a half, sir.

Q What was your occupation prior to your enlistment?

THE WITNESS: Immediately prior to the enlistment?

MR. MORGAN: Yes.

A I worked for—on a labor gang at the U. S. Steel Fairless Works in Fairless, Pennsylvania.

Q And prior to that time what was your employment?
(tr 27) A For a short time I operated a gasoline station on Pennsylvania Avenue in Weirton, West Virginia.

Q And prior to that?
A I worked for Lorentzen Hardware Manufacturing Corporation in Weirton.

Q In what capacity?
A Plant manager.

Q How long had you worked for the Lorentzen Hardware Company?
A Six years, sir.

Q And when you first were employed by Lorentzen what capacity were you in then?
A I was hired as a laborer, sir.

Q And what jobs did you hold with Lorentzen?
A Every job in the plant, sir.

Q Every job in the plant?
A Yes, sir.

Q And when did your employment with Lorentzen Hardware Manufacturing Corporation terminate?
A September of 1955.

Q Do you know Fred Franken?
A Yes, I do.

Q Can you identify him as being in the court room?
A Yes, I can.

(tr 28) Q Where is he?

A Sitting right there at that table.

Q At counsel table?

A Yes, sir.

Q When did you first see Fred Franken, to your knowledge?

A It was in the fall of '54, the early fall.

Q And where did you see him?

A I saw him at the Lorentzen Hardware plant, Weirton.

Q Is that Lorentzen plant in the Northern District of West Virginia, if you know?

A I believe so, sir.

Q State to the Court and jury the occasion of your meeting, what was said, what time of the day it was, and everything that you recall concerning it.

A Well, I was out—as I recall I was out in the plant, and I was buzzed for that I was wanted in the office, and when I came in to the office Mr. Franken was there and wanted to know if I had any steel to be sold, and at the time I told him no, that I didn't have, and he said that he might call back later on, and he left at that time.

Q Did he call back later on?

A Yes, sir, he called just about every week for a period of six to eight weeks.

Q When you say "called," do you mean in person, or by phone, or how?

(tr 29) A In person, sir.

Q And did you let him have some steel?

A Eventually, yes, sir.

Q What led up to your eventually letting him have some steel?

A Well, on this one occasion he came to the plant, and I told him that I didn't have any steel, and he asked me if I would step outside, he would like to see me for a minute, which I did, and when we got outside, why, we sat in his automobile and he proceeded to tell me that he knew that I had already sold some steel and a man named Green was involved in it, and—well, right away I got a little bit scared, and I told him at that time that I would let him know if I had anything in a few days, whereupon he said that he could call back, and he left.

Q Did he call back?

A Yes, sir.

Q How long after that?

A I believe it was a period of a week, sir.

Q And what happened then?

A Well, he had talked to Frank DeGenero, and at the time he told me that—

Q Did he tell you that he had?

(tr 30) A Yes, sir.

MR. SPILLERS: I object to that.

MR. MORGAN: This is a conversation with the defendant.

THE COURT: I believe he is undertaking to detail a conversation with the defendant.

MR. MORGAN: Yes, sir.

MR. SPILLERS: Very well, Your Honor. I under-

stood that the witness had stated that DeGenero told him something.

THE COURT: I understood the witness to say that the defendant, Mr. Franken, had told him he had a conversation with Mr. DeGenero. Is that your statement, Mr. Witness?

THE WITNESS: Yes, sir.

THE COURT: Very well, go ahead.

Q Continue.

A At the time Mr. Franken told me that Mr. DeGenero talked to him and he was perturbed because he wanted to know what business it was of Mr. DeGenero's as to whether he bought any steel off of me or not, and in this conversation he let me know that the steel that I had given to DeGenero—sold to DeGenero—wasn't legitimate steel that should have been sold, and led me to believe that he was going to contact the company if he had to.

MR. GOODWIN: Your Honor please, I would like to object as to what he led the man to believe—

(tr 31) THE COURT: He may state the conversation, but just state what conversation you had, Mr. DeArdo, and then the jury can draw its own conclusions as to the purport of the conversation.

A Well, he said that if he had to he would contact the main office to see why he couldn't get any of it.

Q Meaning what? Get any what?

A Steel.

Q Then what happened? What else was the conversation, as you recall it?

A Well, he told me that by dealing with DeGenero and Green that I had been gypped and hadn't gotten my fair share of the money, and that if I dealt with him it would be strictly a fifty-fifty split right down the middle.

Q What else, if anything, did he tell you at that time in connection with this proposal?

A Well, I told him that if there was anything it would have to be done in a manner where there would be no chance of anyone checking up, no paper work, or no way that anyone could come back and find out where the material was taken from, and at the time he mentioned to me that he worked in conjunction with the plant manager someplace and this plant manager would cover it up on his scrap losses.

Q Explain that. Did he go into any detail as to how (tr 32) the plant manager of some other company had covered up the loss by scrap losses?

A Well, as I recall, it was brought out that if he sold 20,000 pounds of steel, for instance, that during the month's operation in his scrap he would pick up that 20,000 pounds in his scrap figures for the month.

Q Anyway, he told you that he had worked that at another plant at that time?

A Yes, sir.

Q And what happened after that?

A Well, we had some slit material that had defects, and at the time there was no use for it in the plant, and I was—I was scared at the time, so—

Q Why were you afraid?

A Well, I was afraid that he would contact the main office and of course I'd lose my job.

Q Contact the main office in regard to what?

A In regard to the steel that I had sold to—through Mr. DeGenero.

Q Go ahead.

A And so I made arrangements to sell him this one load of slit steel, figuring to myself that if I gave him this one load then I could get him off of my back from that time on.

Q Up until that time, how many times, if you remem-
(tr 33) ber, had he called at the plant at Weirton, at your Lorentzen plant, to obtain steel?

A I'd say six, seven, eight times.

Q Anyway, you indicated that you would let him have this slit steel?

A Yes, sir.

Q Describe what you mean by "slit" steel, Mr. DeArdo.

A Well, we get the coils of steel in from Weirton Steel. They weigh approximately 6,000 pounds, and they're thirty and a quarter inches wide, and in our operation the widest piece of steel used is only seven and a half inches wide. So we would put this thirty and a quarter-inch wide coil on our slitter and slit it down to the different sizes that were needed in our painting operations. Now, this slit steel that was involved in this load had small pinholes and pit marks, and various defects, and had been rejected for use on the paint line.

Q Your company could use it, or could not use it?

A Well, at the time, our company could not use it at the time.

Q And you say that you made arrangements to let

Mr. Franken have that steel?

A Yes, sir.

Q Do you remember approximately how many pounds there were in that?

(tr 34) A It was approximately thirty—it was in the thirty thousand.

Q Thirty thousand?

A Thirty-some thousand, yes, sir.

Q Tell the Court and jury just how arrangements were made for him to obtain this steel from you.

A Well, I told him what day to have a truck there.

Q Where was he when you were talking to him?

A Well, on this one specific load I believe he was at the plant when we made the arrangements, and he took care of the arrangements of having the truck there, and we loaded it, and later on, a period of days, I met him up in Weirton in Ferber's Restaurant and he paid me off there, in cash.

Q How much did he give you?

A At the time I believe it was approximately $800.00.

Q Now, when this steel was loaded do you know what it was loaded upon? Was it loaded upon a Lorentzen vehicle or motor carrier, or loaded on somebody else's carrier?

A It was loaded upon a common carrier; which one I do not know.

Q Then was there anything else done pursuant to his request for steel?

A Well, he stopped by and called several times about more steel, and I kept evading him, and—

(tr 35) Q How would you evade him?

A Well, several times when he called at the plant in person, if I happened to be down in the garage I would send one of the mechanics up to tell him that I was out and wouldn't be back; and if I would see him pull in in his car I would tell Mrs. Baxter, the secretary at the time, to tell him I was out and would not be back.

Q But eventually did you get together again?

A Yes, sir.

Q When was this next time?

A It was in January of 1955.

Q What happened on that occasion?

A Well, made arrangements for him to get a truck load, and I would tell him to have the truck in at—on a certain night, which was usually on a Saturday when the plant wasn't operating, and it was usually at night, and the truck would come in and I would give Jeff Whitehead instructions as to what to load on the truck and Jeff Whitehead would go ahead and load it; and there were no bills—

Q What do you mean, "there were no bills?"

A No bills of lading for the material passed between our company and Mr. Franken, or myself and Mr. Franken, and no paper work of any kind.

(tr 36) Q In preparing loads for trucks that came in to haul this steel away, what would you do, if anything?

A Well, the first few loads I marked what coils and got them down on the floor, the coils that were to be loaded on the truck, and when the truck would come in, why, Whitehead would load it.

Q How would he load it? What kind of equipment

would he use?

A He would use an electric fork lift that we had in the plant.

Q You mentioned January was the next time that there was any further shipment. Do you remember the approximate date?

A Well, there was a shipment around the 6th, and there was one approximately two days after that.

Q Of steel?

A Yes, sir.

Q What was the appearance and what type of steel was included in these two shipments on the 6th and 8th of January?

A Well, they were prime coils, Weirzin.

Q What is Weirzin? Is it a trade name of some kind?

A Yes, it's an electrolytic coated steel that Weirton Steel put out and they have the trade name of Weirzen, and it was prime coils. They all weighed anywhere be-
(tr 37) tween four and six thousand pounds, approximately—

Q Do you remember, referring back to the first load that Mr. Franken you say got, that they were slit coils?

A Yes, sir.

Q Do you know how many or how it was loaded, or were they loaded on individual coils, or what?

A No, sir. With the slit coils we would load them on skids with the channel, which is the coil that's seven and a half inches wide, we normally loaded two to four coils.

Q To a skid?

A Yes, sir.

Q Do you remember, or, if you know, how many skids were involved in the first shipment?

A There was seventeen skids.

Q Seventeen skids?

A Yes, sir.

Q On the January 6 shipment, if you remember or if you know, what was included in that shipment?

A Well, it was approximately between thirty and thirty-five thousand pounds, coils.

Q In coils?

A Yes, sir.

Q Do you remember how many coils were involved?

(tr 38) A Approximately six coils, sir.

Q Did you know where the first shipment was consigned—

A No, sir.

Q (Continuing)—at that time?

A No, sir, because the truck would come in at night and I wouldn't be there, and all the truck driver would have would be a little slip of paper, and there were no bills made out for the load. In other words, when he pulled out with the truck, why, he had no bills of lading.

Q What did he have, if you know?

A Usually, the only thing he would have, he would mark down, the truck driver, for his own benefit, for instance, if there were five coils and they were of different weights, he would mark down on a slip of paper usually what each coil weighed so that, I imagine, when he got into the—

Q (Interrupting) You don't know that?

A No, I don't know what he did with it, no, sir.

Q You just said that Whitehead always loaded. Do you mean to tell the jury that you never helped load?

A Yes, sir, I did.

Q You did what, you meant to tell the jury or you meant to tell you loaded—

A I neglected to tell that I helped Whitehead at times and—

(tr 39) Q But not every time?

A No, sir.

Q Have you seen these truck drivers come in to the Lorentzen plant?

A Actually, I have never talked to any of the drivers, no, sir.

Q But you have seen the trucks come in?

A I have seen the trucks pull in, yes, sir.

Q On the 6th of January, if we may go back to that, there were approximately how many coils loaded?

A Approximately six.

Q And how was the shipment prepared by you? Would you tell the jury again.

A Yes, sir. I got the coils that were to be loaded and took them off of the pile and set them down on the floor so that they would be ready when the truck pulled in and there wouldn't be any trouble getting them out or anything and it would just be a matter of picking them up and going right on up on the truck with them.

Q Will you tell the jury how you knew how many coils to prepare for shipment?

A Well, in most cases Mr. Franken would tell me

what he wanted, the tonnage, and I would get approximate to that as well as I could.

Q And you would take these from what part of the building, the stock part?

(tr 40) A Yes, sir, the back end of the building where all the mill width coils were kept--that's the big coils.

Q And these mill width coils--you say prime steel--what were they doing in the plant? Were they ever there for sale purposes, or were they there for manufacturing--

A (Interrupting) They were there for manufacturing only. There was no sale involved at all.

Q Did your company, as far as you know, ever engage in the sale of steel?

A No, sir.

Q Then you spoke of the 8th of January as there having been another shipment of steel from Lorentzen. When was that arranged for, if you recall?

A At the same time that the shipment on the 5th or 6th was.

Q And what type of cargo was included in that shipment?

A That was the same thing, prime mill width Weirzin coils.

Q Were there any other shipments after that?

A Yes, sir.

Q Were the shipments involved all pertaining to mill width prime steel in coils?

A Yes, sir.

(tr 41) Q I mean, there wasn't any more slit coils?

A No, sir.

Q It was all prime steel?
A Yes, sir.

Q And was it in the same condition as it was when you received it, if you know?
A Well, it was prime steel. I mean, it had no defects.

Q You say that it is called Weirzin steel?
A Yes, sir.

Q What is the source of that Weirzin steel? Where did you get it from, what company?
A Weirton Steel Company in Weirton, West Virginia.

Q You had one shipment in November, as I recall, and two in January, is that correct?
A Right.

Q How were you paid for the steel that you all loaded in January?
A I was paid in cash.

Q Who by?
A Mr. Franken.

Q Where?
A Well, at different times I was paid at different places. I can name some of those. I don't—

Q Well, maybe we'll get ahead of our story. When was there another shipment made?
(tr 42) A In February.

Q Do you remember the approximate date of that?
A No, I don't, sir.

Q How many shipments were made in February, if you remember?

A Two, I believe, sir.

Q Do you remember the contents of those shipments or those loads?

A Well, they would be approximately the same. They would be between thirty and forty thousand pounds, approximately; usually five to eight coils, prime steel.

Q And there were two shipments of those made in February?

A Yes, sir.

Q Do you remember what days they may have been on, days of the week?

A Well, if—I remember one shipment must have been on the 21st, because it was the day before George Washington's birthday and the plant was shut down for the holiday; it was a paid holiday for the plant, and operations had ceased.

Q Do you remember what day of the week or month the other shipment in February, 1955, was?

A Well, it would have been on a weekend—it would have been on a Saturday or a Sunday.

(tr 43) Q Why? Didn't the plant operate on Saturday or Sunday?

A Normally, no.

Q Were there any further shipments that you shipped out, arranged for by Mr. Franken?

A Yes, sir.

Q All right, tell us the next one, please.

A The next shipment was in May of '55, and—

Q (Interrupting) Do you remember what day of the week or month that was on?

A I don't remember the exact date, but it would normally be like I said, on a weekend. There was one shipment that was made during the week, and at the time I closed the paint lines down because I knew the truck was coming in.

Q Why did you close it down?

A I said that there was going to be a power shutdown.

Q You told the plant employees that?

A Yes, I told the paint line that.

Q What did they do at that, did they leave or—

A (Interrupting) Well, yes.

Q (Continuing)—stop painting, or what?

A Well, we closed the paint lines down and emptied the plant and shut the plant down for the rest of the night.

Q How many, if you remember, coils were involved in that shipment?

(tr 44) A Well, there would have been approximately five to eight, like I say, on just about every load.

Q Sometimes was there more than one truck Mr. Franken sent in?

A Yes, sir.

Q How many trucks were sent in on this occasion, if you remember?

A Two, I believe, sir.

Q And how many coils, if you remember, was the total that were shipped out?

A Well, the total would be around thirteen, fourteen coils.

Q And that was in May, I believe you testified?

A Yes, sir.

Q Were there any other shipments in May that you know of?

A None I know of, sir.

Q Were there further shipments?

A Yes, sir.

Q When was the next shipment?

A June.

Q Was that a single or a double shipment?

A That was a double.

(tr 45) Q Double shipment?

A Yes, sir.

Q And do you remember what day that fell on?

A No, sir. It was on a Saturday or a Sunday.

Q Were there further shipments?

A Yes, sir.

Q When was the next shipment?

A July.

Q And was that a single or a double shipment?

A Double, sir.

Q And how many coils, if you know, were shipped in that July shipment?

A Approximately fifteen, sir.

Q Was that the last shipment?

A No, sir.

Q When was the next shipment?

A August.

Q August of what year?

A '55, sir.

Q Was that a single or a double shipment, if you remember?

A That was a single.

Q And how many coils were loaded at that time?

A Approximately six.

(tr 46) Q Was that the last shipment?

A Yes, sir.

Q Do you know, roughly, how many coils or how many pounds of steel you let Mr. Franken have?

A Roughly, around three hundred some thousand pounds, I believe, sir.

Q Was that steel stolen?

A Yes, sir.

Q Did you have any authority or any control over it except for the purpose for which it was sent in there?

A No, sir, I didn't.

Q Did Whitehead help you?

A Yes, sir.

Q Did he help load all these loads, as far as you know?

A Yes, sir.

Q Did anybody else help you during any of these loads?

A Tom Fabian, slitterman.

Q Slitterman?

A Yes, sir.

Q If you remember, did he help you on all the loads?

A No, sir. He, I believe, helped on the last three or four loads—the last three, I believe.

Q Do you know whether he knew this steel was stolen?

A Yes, he did.

(tr 47) Q How much money did you receive, in all, for this steel?

A Approximately $8500.00.

Q That's the aggregate of the various payments you received?

THE WITNESS: From Mr. Franken?

MR. MORGAN: Yes.

A Yes, sir.

Q Was that money in any way credited to the company?

A No, it wasn't.

Q Never ran through the company books?

A No, sir.

Q You started to testify earlier, I believe, in your testimony as to the manner of payment, and we hadn't concluded all of these various shipments at that time in your testimony. Would you tell the Court and jury now how you received payment, in what denomination, or by what kind of paper, where it was received and how often following a shipment, as much as you recall.

A Well, several times I met Mr. Franken at different places away from the plant—one time, specifically, in front of the Sacred Heart of Mary Church in Weirton, which is up at the north end of Weirton on the road going to New Cumberland. I met him there in his car. He paid me. And normally just about all payments were in fifty-dollar bills.

(tr 48) Q Ever get a check?

A I never got a check. I received a Western Union money order from Mr. Franken, who at the time was in Chicago, and he sent me money through the Western Union.

Q In what amount, if you remember?

A It was around, I believe, thirteen hundred or fifteen hundred dollars, something like that.

Q And how was that addressed?

A It was addressed to Paul DeArdo.

Q Where?

A Western Union, Weirton, West Virginia.

Q Was that addressed to you at the plant?

A I don't recall, sir, whether it was or not.

Q Did you receive any money from Fred Franken through any other means or by any other person?

A Yes, sir. I believe twice I sent a man named Stewart who worked for me to Youngstown and Mr. Franken would give him an envelope containing money and he would bring it back to me; and Mr. Whitehead made a trip to Youngstown.

Q You don't know where he went, do you, actually?

A No, I don't. I was in Florida at the time and I had asked Mr. Whitehead to contact Mr. Franken and send me $500.00, and I don't know whether he went to Youngstown or met him outside of the plant or in the plant, but I do know that he sent me $500.00.

(tr 49) Q Whitehead sent you $500.00?

A Yes, sir.

Q Now, in speaking of the preparation of these coils, did you do anything to the coils before you loaded them

on the carriers?

A Yes, sir, we would take our own weight tickets off of them, we would take the Weirton Steel coil ticket and weight ticket off of them, and they also had a stencil marking on it showing that it was from Weirton Steel and consigned to Lorentzen Hardware Half-Moon Farm Tract, and the stencil, we would take a leather glove and spit on the coil and rub it off, and when the coil was loaded onto the truck there was no identification, no markings of any kind, and, in fact, one time Mr. Franken raised the devil with me because Whitehead had forgotten to take off a coil ticket on one of the coils and Mr. Franken had evidently caught it up at Sharon or some place.

Q You mean it was detected that all of the identification of Lorentzen wasn't off the coils and he criticized you for it?

A Yes, sir, and told me to make sure that Whitehead was more careful in the future.

Q Have you ever been in the home of Fred Franken? (tr 50) A Yes, I have.

Q How often?

A Three or four times.

Q During the course of these shipments?

A No, sir, afterwards.

Q For what reason?

A Well, I went up to see him when this first came out and talked to him—Whitehead went with me at the time—and we talked to him for approximately an hour or so, and I was up a few times after that.

Q At any of these times did you give him any re-

ceipts?

A Well, not at these times, sir. He approached me and asked me about receipts, and I finally gave him some receipts—it was in the first part of '56 but they were back-dated to 1955.

Q Where did you give him these receipts?

A He came to the gas station that I was operating and picked up some receipts, and the balance I gave to him at his home in Youngstown.

Q What did those receipts show?

A They showed that I had received so much money on such-and-such a date for steel sold to Mr. Franken.

Q And the first receipts that you gave, were they written on some kind of paper?

(tr 51) A. They were written on some sort of a receipt book that he had in his presence and he gave me pages out of it and I wrote receipts out on that; then later on he said it would be better if I had company letterhead paper to make the receipts out on.

Q And did you furnish him those receipts?

A Yes, sir.

Q Did he tell you why he wanted those receipts?

A He said it had something to do with his income tax.

Q You were employed at that time?

A No, sir.

Q Had he talked to you about your employment at that time?

A Well, sir, he mentioned about talking to a Mr. Levkovitz and getting me a job with him, with his company.

Q You needed a job then?
A Yes, sir.

Q How did you know what to write on these receipts, DeArdo?

A He told me the approximate dates to make them out for and the amounts to make them out for, and they were somewhere in the neighborhood of $20,000.00 that he was concerned with.

Q Did you make them out in anyone else's presence?
A Yes, sir.

(tr 52) Q Whose?

A My mother-in-law, my brother-in-law, and another fellow, Eugene Starko, from Weirton.

Q Eugene who?
A Starko.

Q And what are the names of your mother-in-law and brother-in-law?
A Lucille Harris and Robert Arnold.

Q And where were these made out?
A The majority of them were made out at my mother-in-law's home.

Q And where is that?
A On Wetzel Street in Weirton. And the balance were made out at the gasoline station on Pennsylvania Avenue in Weirton.

Q Did you make any extra ones out at that time?
A Yes, sir.

Q Why?
A I made one extra and kept it for myself, because I figured that—Mr. Franken had told me that he was

going to help me out, and so forth, and I figured he wasn't at the time, and I kept this one because I knew that if this came up sooner or later that it would be brought up.

Q Do you have it with you?
(tr 53) A Yes, I do.

Q May I see it?

Thereupon, the witness produced a paper that was marked Government Exhibit No. 1 for identification.

MR. SPILLERS: No objection.

MR. MORGAN: The Government offers this receipt that has been testified concerning by this witness as Government's Exhibit No. 1.

THE COURT: Without objection it may be admitted in evidence.

Thereupon, said receipt was received into evidence as Government Exhibit No. 1.

Q Do you remember Mr. Franken's car, what kind of a car it was?

A He had a Pontiac Catalina.

Q What color?

A Sort of a reddish or rust color, two-tone, rust and ivory.

Q Do you recall he had the same car all during this series of transactions?

A Yes, sir, because when I first met Mr. Franken

he had just got it, and when this all first came up he mentioned at the time that by working with him I would soon be able to afford a car like that myself.

(tr 54) Q You say your employment was terminated when?

A September, 1955.

Q Do you know whether or not an inventory was conducted prior to your dismissal?

A Yes, sir, an inventory was conducted around the 22nd, 23rd of August.

Q If you know, will you tell the jury why the inventory was conducted?

A Because there had been a coil found that belonged to Lorentzen Hardware, and it was brought to the company's attention so they immediately came down to take an inventory of the steel.

Q Now, just to clarify any question, did you, as plant manager, have any authority to sell anything in that plant?

A No, sir.

Q I assume that you had some scrap.

A Yes, sir.

Q Did you have authority to sell it yourself and pocket any proceeds you might obtain from it?

A No, sir.

Q Did you have a normal party that would take off scrap from the plant?

A Yes, sir.

(tr 55) Q What was his name?

A Marvin Platter.

Q And where does he live?

A He lives in, or did live in Follansbee, West Virginia.

Q And you sold him scrap?

A Yes, sir.

Q And what happened to the money received from that, DeArdo?

A Well, some of it I kept, but most of it Mr. Platter would make out a check payable to Lorentzen Hardware Manufacturing Corporation at the end of each month, and that check was mailed along with the weight slips for the different loads of scrap in to our New York Office.

Q In other words, it got back into the company's books?

A Yes, sir.

Q What value, if you know, had the scrap by pound?

A Wouldn't run more than—

Q (Interrupting) What did you get for it, a pound, in other words?

A Well, that varied, I mean, depending upon the scrap market and depending on what kind of scrap it was, whether it was painted scrap, which was much lower than the unpainted scrap, but it wasn't too much, couldn't be more than a penny or two cents, something like that.

(tr 56) Q Do you remember the names of the trucking concerns that picked up the shipments of coils from Lorentzen, as you testified, by Mr. Franken?

THE WITNESS: At the time it was done?

MR. MORGAN: Yes.

A No, sir.

Q You don't remember?

A No, sir.

Q You never saw any of the papers, you don't actually know whether there were any papers transferred by Whitehead to the driver?

A There were no papers. If there had been papers I would have had to make them out because Whitehead at the time didn't know anything about making a bill of lading out.

Q What was his official capacity in the plant?

A He was the plant's head mechanic.

MR. MORGAN: You may inquire.

CROSS EXAMINATION

BY MR. SPILLERS:

Q As I understand, you ceased working for the Lorentzen Hardware Company in September of 1955?

A Yes, sir.

Q Were you discharged or did you quit voluntarily?

A I was discharged, sir.

(tr 57) Q And this receipt that has been placed in evidence here, January 13, 1955, "Received of Fred Franken $2500.00 for steel coil sold," does this bear your signature?

A Yes, sir.

Q And when did you deliver that to Mr. Franken?

A It was the first part of '56, February, March, around there.

Q Where did you get this paper that it's written on, "Lorentzen Hardware Manufacturing Corporation?"

A I had some of that paper home.

Q The papers that you gave as receipts, did you receive the money for them?

A No, sir, not as much as I made receipts out for, sir.

Q Do you have some record or memorandum of your own showing the moneys that you did receive from Mr. Franken?

A I have no record, sir.

Q Just your memory?

A Yes, sir.

Q How do you know it was $8500.00?

A Because that's approximately what I received, sir.

Q Well, "approximately"—it might have been ninety-five hundred or it might have been seventy-five hundred?

A No, I wouldn't say it was that far off, sir.

Q How far would you say?

(tr 58) A I would say it would be between eighty-five hundred and nine.

Q But you didn't write it down any place?

A No, sir.

Q I understood, in answer to one question from Mr. Morgan, that you stated that on these receipts, when you first gave receipts you placed dates on them and amounts, just on ordinary paper?

A Yes, sir.

Q And that later you were asked and did date them different dates and use company paper such as this?

A Yes, sir.

Q On all the transactions?

A Yes, sir.

Q And this occasion that you spoke of in front of the Sacred Heart Church in Weirton where you received one payment in fifty-dollar bills, was that meeting at your suggestion to meet there?

A We had set up prior to the beginning of this that I couldn't be paid at the plant as no one was to know—that was before the first load was ever sold—and that the payment—the payment was to be in cash.

Q On this one payment that you spoke of, the money order from Chicago, Illinois, of about thirteen hundred and fifty eight or sixty-eight dollars, was that sent to you (tr 59) at your request from Chicago?

A Yes, sir. I called Mr. Franken and he was in Chicago at the time and he sent me the money from Chicago.

Q And did you request him to send it by telegram?

A Yes, sir.

Q Why did you do that?

A I told him at the time I needed the money, and he was going to be out of town for a few days and—

Q (Interrupting) Do you remember what that payment was for?

A That was for steel that he had received.

Q When? When had he received that?

A I don't know what date, because I don't know exactly what date the Western Union money order was on.

Q Let's see, as I understand you, the first time you

ever met Mr. Franken was sometime in the early part early fall of 1954?

A Yes, sir.

Q Can you place about the month that was?

A I believe it was in the first part of September, sir.

Q Of 1954?

A Yes, sir.

Q And at that time were you the plant manager?

(tr 60) A Yes, sir.

Q Search your memory and see if you can recall and tell the Court where that first meeting occurred.

A In the office at Lorentzen Hardware Manufacturing Corporation, Weirton, West Virginia.

Q And as plant manager there, you may say whether or not it was customary for various traveling people and salesmen to call on you there and see you as plant manager.

A Yes, they were.

Q By the way, if you recall, what designation in the way of a placard or shingle or sign is there up there, or was there at that time, to give the name of that company?

A At that time I don't believe there was any sign up on the building.

Q Wasn't there a small sign about two or three feet in length and about six or eight inches in width, saying "Lorentzen Hardware Company" up over the door?

A Well, I'm not sure whether that was up at that time or was put up later on.

Q But you do recall that there was such a sign?

A Yes, sir.

Q And on this first occasion when Mr. Franken came

in did he show you a business card?

A Not that I recall, sir.

(tr 61) Q Did he state what his mission there was?

A He said that he was there in reference that—he wanted to know if we had any steel to sell.

Q Yes, sir, and at that time what did you reply?

A I said no, we didn't.

Q Did you make it clear to him at that time that there was never any steel sold there?

A That's right.

Q You told him that at that time?

A I told him that we did not have any steel to sell and that, as far as I knew, there wouldn't be any, and he said that he would, well, he would call back anyway, that he had to be over in that neighborhood.

Q Did he tell you what, if any, other companies, he called on up in through there?

A If I recall, I believe he did mention that he had called on Kusic & Haines.

Q And after this first interview with Mr. Franken, about how long was it before you saw him again?

A Approximately a week.

Q And where did you see him on that occasion?

A At the office.

Q And was there anyone else present during this conversation?

(tr 62) A Yes, usually Mrs. Baxter was present, the secretary.

Q Mrs. Baxter?

A Yes, sir.

Q And would she be able to hear the conversation that you would have?

A Normally, yes, sir.

Q And at that time when he called back what did you say to him?

A I said that we didn't have anything.

Q Did you invite him to come back?

A Well, no more so than I did any other salesman. I didn't come right out and tell any salesman, "Get out, stay out. I don't want to see you back here any more." I mean, if they said, "We'll call on you again the next time we're in the neighhborhood," I said, "Well, certainly, that's all right."

Q In other words, you were courteous and polite to them?

A Yes, sir.

Q But on this occasion did you make it clear to him that there was no steel to be sold from that plant at any time?

A I believe I made it clear.

Q Well, do you recall whether you ever stated to him (tr 63) that your duties there and your authority did not give you the right to sell steel?

A Well, I told him that that was handled out of our New York office.

Q Out of which office?

A New York.

Q New York City office?

A Yes, sir.

Q Was that on the first or the second visit?

A I don't recall, sir.

Q And he came to you when after this second visit?
A Approximately a week.

Q Approximately a week?
A Yes, sir.

Q And do you remember what time of day it would be?

A Well, usually it was in the evening, close to five o'clock.

Q What time did you normally conclude your day and leave the office up there, Mr. DeArdo?

A It varied; anywhere from three-thirty to nine, ten o'clock at night.

Q About how many people did you have under your supervision and in the employment of the company there?

THE WITNESS: At that time?

(tr 64) MR. SPILLERS: Yes, sir.

A Approximately, thirty.

Q Was there any work there at night?
A Yes, sir.

Q There has been some reference here to a paint line, and that to me means some type of assembly where you're taking this equipment for venetian blinds and painting it and moving it in such a way that it would dry. Is that correct?

A Yes, sir, it went through a drying oven immediately upon being painted; it went through a drying oven to set the paint, and immediately upon coming out of the

oven it went through a cold water bath to shock it and set it.

Q Right in that connection, with reference to the shipping landing, or where you would load and unload, was that paint line anyways near that?

A Yes, sir.

Q Then it would not be practical or advisable to load or unload heavy equipment during a time this paint line was operating with fresh paint, would it?

A Well, sir, for six years that I know of that's the only time we loaded or unloaded anything was during the daytime. Every coil of steel that ever came in from Weirton Steel was brought in through the back door during the daytime hours when the shipping crew was there, (tr 65) because they only worked eight hours during the day.

Q Just a minute, that's what I wanted. In other words, the loading or unloading had nothing to do with the operation of the paint line?

A Well, no, sir. I mean, actually, we tried to keep our floors clean to the point where we would normally have to use the fork lift to take our coils from the stock pile to the slitter, which sits right beside the paint line, and the fork lift would naturally have to be used through the daytime, so the floor was swept several times a day in that plant from one end to the other, every day, to keep down the hazard of dust or dirt.

Q Coming back, as I understood you, and if I'm wrong correct me in this—I understood you to tell the Court and the jury that the reason that you weakened and changed your decision to deal with this defendant, Mr. Franken, was because he in a way threatened or black-

mailed you to do that.

A I don't believe that I mentioned blackmail.

Q No, you didn't mention it, but that you did that because he indicated if you didn't do it you would get in trouble.

A I would put it this way: He had me awful scared.

Q And, please, since he had you scared, why would (tr 66) he frighten you by that?

A Because I had already done something that I shouldn't have done.

Q And what was that?

A Some steel had been sold to—given to Mr. DeGenero, which was sold through Mr. Green, and Mr. Franken knew about it, and at the time it seemed awful logical to me that if he was to go to the company and tell them that he knew of it he certainly wouldn't be in any bad spot but I certainly would be.

Q Who had sold this steel to Mr. DeGenero?

A Well, Mr. DeGenero and I took the steel together, is the way it was.

Q And when was that?

A That was in '54.

Q What time in '54?

A That was in the summer of '54.

Q Before Mr. Franken ever came to you?

A Yes, sir.

Q And what kind of steel was that?

A That was prime Weirzin coil, sir.

Q And who frightened you into doing that?

A No one frightened me into that, sir.

Q You did that one particular thing before you ever knew Mr. Franken?
(tr 67) A Yes, sir.

Q Did Mr. Franken say that you had done that?
A He said that he knew that I had—that Mr. Green had gotten steel through there, and on this one trip he mentioned that if he had to he would go to our main office and see why he couldn't get any of it.

Q Well, by that did he tell you that the transaction had been illegal or improper in any way?
A He implied to me that he knew enough that it scared me bad enough that I immediately—upon his first trip I immediately got hold of Whitehead to go get DeGenero, because I figured that Mr. Franken was actually an F.B.I. man.

Q Who is this Mr. DeGenero that you have referred to?

THE WITNESS: Who?

Q DeGenero. Did he work for you?
A No, he didn't, sir.

Q Who is he?
A He lived at Follansbee at the time, and he had a truck of his own.

Q And how did he come into this conversation with you and Mr. Franken, the defendant here?
A Well, as I said at the time that Mr. Franken and I talked in the car and he told me about knowing that (tr 68) Green had got some steel through the plant, and implied that it wasn't exactly right—

Q (Interrupting) Now, just a minute. Two or three times you have, in answer to Mr. Morgan, stated what he implied. If you can, will you please tell the Court and jury, instead of saying "he implied," actually what he said and what you said?

A I can't remember it word for word, sir.

Q Well, as nearly as you can remember it.

A Well, he told me that he knew that Green, by dealing with Green and DeGenero that I had got gypped, that I hadn't got my proper share of the money, was one specific thing that he said.

Q And what share of the money did you get?

A Actually, I don't know what share of the money I got, beacause it's never been clear exactly what was received. I mean at the time I took DeGenero's word for what he received for it and what he gave to me.

Q That is not this case, but I mean here, please tell the Court what you were to receive from Mr. Franken for steel that you had delivered to him.

A Well, there was no set amount.

Q You mean that you didn't tell him what you would have to have per pound or per ton?

(tr 69) A No, sir.

Q How would he pay you?

A He paid me between $1500.00 and $2500.00. Whatever he gave me I figured as being a split, because I knew nothing about where it was going or what he was getting for it or how to go about getting rid of it.

Q Isn't it a fact that Mr. Franken would tell you that he could sell a load of steel for a certain price and that he could pay that to you for that steel?

A No, sir.

Q It is not?
A No, sir.

Q What would he tell you?
A Actually, there wasn't anything told. He had told me that he would split down the middle with me, fifty-fifty.

Q Was he ever present when any of this steel was loaded?
A Not that I know of, sir.

Q And you did say that you were there on three or four occasions to help Mr. Whitehead?
A Yes, sir.

Q Was Mr. Whitehead in, in any way, in your arrangement to load and deliver this steel to some carrier sent in there by the purchaser?
(tr 70) A I don't get what you mean by "arrangement," sir.

Q Well, to put it another way, was he to get some of the money that you were getting?
A Yes, sir.

Q What amount was he to get?
A There was nothing definite on that.

Q Were you to split it down the middle with him?
A Well, not exactly, no, sir.

Q And this other man that you referred to, Mr. Fabian, was he in on that?
A At the end, sir.

Q And what amount did he receive?
A Well, as I said before, there was no set amount with anybody.

Q I understood you to say that during this period or a part of this period you did sell scrap for your company and, in some instances, receive checks.

A Yes, sir. That was the normal operation.

Q You were authorized to do that?

A I had nothing to do with it, sir. The operation was set up before I took over the plant. It was set up in this manner: Platter had a verbal contract with the company. His truck was left at the plant. When his truck was full he would take it over to the junk yard. It would be (tr 71) weighed. At the end of the month he would come in to the office with the weight slip and a check made out for that amount. There was no arrangement made for me to sell it to Platter. That was already set up when I took the plant over.

Q On these payments where he would sometimes pay with cash and you would not turn that in, approximately how much was that?

A I'd say it wouldn't involve over two or three hundred dollars.

Q And that is during the years '54 and '55?

A That was over quite a period of time, yes, sir.

Q And what was your salary there as plant manager?

THE WITNESS: At the time I was let go?

MR. SPILLERS: Yes, sir.

A $175.00 a week.

Q Did you have any traveling expense or any expense allowance?

A No, sir.

Q This $8500.00 was received, according to your remembrance, from the sale of the steel to Mr. Franken during the period from November of '54 until August of '55?

A Yes, sir.

Q And during all that time you were receiving $175.00 a week besides?

(tr 72) A Yes, sir.

Q Are you married?

A Yes, sir.

Q Were you married then?

A Yes, sir.

Q How much of a family did you have?

A Two step-children.

Q And where were you living?

A Weirton.

Q At the same address you gave here?

A Yes, sir.

Q And did you own your home there?

A I was buying my home, yes, sir.

Q And did you have an automobile?

A Yes, sir.

Q What kind of a car was that?

A In the middle of 1955 I bought a '55 Chrysler Windsor.

Q And did you fellows have some poker games up there?

A Yes, sir, we had some lulus.

Q What type of poker games were they?

A Well, it was—we just played a lot of poker.

Q I mean by that, was it table stakes for high stakes, or was it an ordinary dollar or two-dollar game, something like that?

(tr 73) A No, I'd say it was pretty high stakes.

Q And was that in the office there at the plant?

A Sometimes.

Q Did Mr. Franken here play in those games?

A Not that I know of.

Q Was he ever present when there was such a game going on?

A Not that I know of.

Q During the contacts that you had with Mr. Franken, I will ask you to recall back and say whether or not during any of that time Mr. Franken was rude or aggressive or discourteous to you in any manner, and talked to you in a mean or threatening manner.

A There were a few times he was rude, yes.

Q Tell us about that, please, sir.

A Well, there was one period, like I said before, when I was trying to more or less stay away from Mr. Franken— he's even called my home and I've instructed my wife and oldest child that if he called I wasn't there, and then finally when he would get hold of me, I mean, he was fairly rude, yes.

Q Going into that just a little bit, I understood you to say that you had been in the Army for about a month and a half.

(tr 74) A Yes, sir.

Q And that was after you had had the misfortune to

be discharged from this position up there and you had been interviewed by certain Government investigators, hadn't you?

A Yes, sir. It was approximately a year and half.

Q I don't know too much about military uniforms, but from the uniform that you have, with the indicia of being a paratrooper, a combat infantryman, and you have won something for taking part in combat. When did you win this decoration that you wear?

A This is a regular infantry decoration, sir.

Q And the other one?

A And this is a Belgium fourragere.

Q And the combat infantryman, you had to get that in combat. When did you get that?

A Yes, sir, with the Eleventh Triple A Unit.

Q When?

A 1944.

Q And with what Army were you?

A Attached to the First Army.

Q The First Army—was that Hodge's Army?

A I believe so, sir.

Q Now, with that combat infantryman's badge—and you were thirty-three or thirty-four—

(tr 75) A Yes, sir.

Q (Continuing)—do you want the Court and the jury to believe that you were afraid of this defendant here, a man in his late fifties?

A I wasn't afraid of Mr. Franken personally, Mr. Spillers. I was afraid that he would go to the company and that I would lose my job.

Q Do you want the Court and the jury to believe that you would permit him to get you to do something very wrong, and that you knew that he was wrong, just because you were afraid he might go to some company over there and complain that he couldn't get steel when someone else got it?

A Well, he had me afraid, sir.

Q What?

A He had me afraid.

Q And that's the reason you were afraid?

A Yes, sir.

Q Yet you had already sold steel through this Mr. DeGenero?

A Yes, sir.

Q By the way, how much steel had you sold of the company at the time he came to you?

A I believe—now, I'm not positive on this figure—(tr 76) I mean, you want an approximate figure, is that all right?

Q Yes, do the best you can.

A I believe it was around 150,000 pounds, sir.

Q And about approximately what had you received for that steel?

A Approximately fifteen hundred, two thousand dollars.

Q And did you send any of that to your employers?

A No, I did not, sir.

Q When did they first come down there and say to you that there was something in the operation there that was not proper?

A Well, they came down, it was around August 22 or 23 of '55, and there was nothing mentioned about anything being wrong with the operation. They immediately started taking an inventory. Two days later I went to Mr. Shaller, the vice president, and admitted what I had done to Mr. Shaller.

Q Where was his office?

A His office at the present time is in Hoboken, New Jersey.

Q No. No, I meant at this time.

A Hoboken, New Jersey.

Q And did you go over to Hoboken and talk to him at the time you told him there was something wrong?

A No, sir.

(tr 77) Q Where did that occur?

A That occurred at the Lorentzen plant in Weirton.

Q Was he just down there temporarily during this inventory taking?

A Yes. He normally came down, I'd say—oh, at times he would come down once every two or three months, and he came down with Mr. Conrad and another man that I can't recall his name, Mr. Conrad's assistant, and two days later, when I first came to work in the morning I waited on Mr. Shaller and told him that I would like to talk to him, and we went outside and I told him at that time what I had done.

Q Told him just what you have told the Court and jury here today?

A Well, at that time I didn't say anything about Whitehead or Fabian or DeGenero being in on it, no, sir.

Q You took the blame yourself?

A I was trying to, yes, sir.

Q And what did he say to you at that time?

A Well, he was awfully hurt and awfully disappointed, and he said that he would like for me to give him a statement, and we went to a lawyer in Steubenville—he had called somebody in Weirton Steel and wanted to know who a good attorney was at Steubenville, and we went there and then from there we went up to the court—I don't know whether it was the Federal Court—it was (tr 78) in the post office building—and there was a woman and she took down the statement.

Q And did you sign the statement?

A Yes, I did, sir.

Q And have you given other statements about this?

A Yes, sir.

Q How many?

A Approximately four, I would say.

Q And did you sign them all?

A I don't know whether I signed the one I gave to my own lawyer or not; I don't recall.

Q Who is your lawyer?

A Mr. Stearn, Hyman Stearn.

Q In—

A Steubenville.

Q During your negotiations with Mr. Franken, did you ever tell him that you were not turning any of this money in to your employer?

THE WITNESS: That specific statement?

MR. SPILLERS: Yes, sir.

A Not that I recall.

Q With reference to these statements that you have made—not to your attorney, because that is of no concern here, but to someone who had identified himself to (tr 79) you as being a proper agent of our Government, for instance, a member of the Federal Bureau of Investigation, did you give any statements to them?

A Yes, I did.

Q How many?

A One, I believe.

Q Only one?

A I believe so.

Q And do you remember the name of the person to whom you gave that?

A Mr. Macy.

Q And when was that statement given?

A I don't recall what the date was.

Q As nearly as you can approximate it. Was it in '56?

A It was in '56, yes, sir.

Q Was it in the first part of '56?

A Yes, sir, somewhere around, I believe, sir.

Q And where was that given?

A Right here in Wheeling.

Q And to whom did you give—not to Mr. Stearn—but to what other people did you give statements that were written up, statements where you related what you have related here in this court room?

A Well, I gave the one to the company when I first confessed.

(tr 80) Q That's to Mr. Shaller?

A Yes, sir.

Q And then what else, what other statement?
A I gave one to Mr. Macy.

Q Yes, and what else?
A I believe that's all.

Q Besides the one to your attorney?
A Yes.

Q And were they all the same?
A No, sir.

Q They are all different, are they?
A Well, not that—I mean, the first statement, as I said, I gave to the company I didn't bring Mr. Whitehead, Mr. DeGenero, Mr. Fabian, into it.

Q This next question, soldier, is in no way intended to embarrass you but merely to find out whether or not you have made an appearance and taken any action in this case, this indictment, that we have here, with reference to your case, where you're named as a defendant.
A Yes, sir, I have.

Q And what was that?
A I pled guilty.

Q When?
(tr 81) A January 7, I believe.

MR. SPILLERS: That's all, Your Honor.

REDIRECT EXAMINATION

BY MR. MORGAN:

Q To clear up a possible misunderstanding, DeArlo,

I will hand you again Government Exhibit No. 1, and ask you to tell the Court and jury whether or not that is an actual receipt that you gave Fred Franken, or is that a copy of one that you made to show that you had given others like it to him?

A This is a copy of some that were handed to him, are made out exactly the same way with the same signature, and they were witnessed.

Q I believe you may have testified that you gave him receipts on all occasions. Upon cross examination you made that statement. I will again ask you, did you ever give him a receipt during the period of this alleged conspiracy?

A No, sir. The only receipts that Mr. Franken has were made in 1956 and were back-dated to '55. If I said I did I was mis—heard wrong.

Q There was a slight discrepancy between your New York home office and your Hoboken home office. Where was the home office of the Lorentzen Company originally?

A New York City.

(tr 82) Q And was it ever changed?

A Well, the way that came about was this: We had a plant at Elizabeth, New Jersey, and the main office was in New York City. All the paper work went through the New York office. Mr. Shaller, after they had bought the Hoboken plant, Mr. Shaller moved his office over to the Hoboken plant, and when they finally got it operating and got in functioning then all of the Weirton correspondence then, instead of going into the New York office, was channeled from the Hoboken office over in to the New York office.

Q I believe you testified that Whitehead and Fabian

did receive money from you for their participation in this arrangement.

A Yes, sir.

Q Was it paid to them in cash or was it paid to them in a poker game, or just when and how was it paid, if you remember?

A Both.

Q There was some paid in cash and some paid as a stake in a poker game when they were broke?

A Some was paid as cash across the poker table, yes, sir.

Q If you know what amount did Whitehead get?

A I believe around $1500.00, sir.

(tr 83) Q How about Fabian?

A Around a thousand, something like that.

MR. MORGAN: That's all.

JAMES A. WHITEHEAD, having been first duly sworn as a witness, thereupon testified as follows:

DIRECT EXAMINATION

BY MR. MORGAN:

Q Your name is James A. Whitehead?

A Yes, sir.

Q Are you the same James A. Whitehead that is jointly indicted with Fred Franken and Paul Albert DeArdo in No. 6936 now pending before this Court?

A I am.

Q What is your age?

A Thirty.

Q Your address?
A 508 Helen Street, Weirton, West Virginia.

Q Where are you employed?
A Lorentzen Hardware Manufacturing Corporation.

Q And where is that located?
A Weirton, West Virginia.

Q And how long have you been so employed?
A It will be six years in May.

(tr 84) Q Are you employed there now?
A I am.

Q Do you know Fred Franken, the defendant, on trial in this case?
A I do.

Q Is he in the court room?
A Yes, he is.

Q Would you point him out, please?
A Sitting right there (indicating Mr. Franken).

Q Have you ever seen Fred Franken before?
A Yes, I have.

Q Where?
A Weirton, West Virginia.

Q Whereabouts in Weirton?
A At the plant.

Q Do you remember the occasion or the time that you saw him first, approximately?
A I don't—I don't get you on that.

Q When did you see him at the plant?
A It was the latter part of '54 and beginning of '55. I don't remember the exact date.

Q At what time of the day or night did you see him?
A This was in the afternoon.

Q Was he with anyone?
(tr 85) A He was with Paul when I walked into the office.

Q You saw him in the office?
A Yes.

Q At the Lorentzen Hardware Manufacturing Company?
A Right.

Q Did you talk with him?
A No, I didn't.

Q Have you ever talked with him?
A Later on, I have.

Q Have you seen him more than once at the Lorentzen plant?
A Yes, I have.

Q How often have you seen him?
A Well, it was pretty often. The exact days I wouldn't know, but it was pretty often that he would come around.

Q Do you know what he was there for?
A Later on I learned, yes.

Q Do you know whether or not DeArdo wanted to see Mr. Franken—
A (Interrupting) He didn't.

Q (Continuing)—at the times he was there, if you know?
A He didn't.

Q How do you know that?

(tr 86) A He tried to avoid him. He used to—he used to hide in my—I have a garage that joins onto the plant, down in behind the plant, in other words, and I have a parts room in there—and if he would see Franken's automobile drive in the lot he would have someone go up and tell Franken that he wasn't around, that he would either be visiting in the Hoboken plant or out of town on business.

Q Just what is your official job with the Lorentzen plant?

A Mechanic. I am the head mechanic.

Q Do you have any equipment there?

A We have tractors and trailers.

Q How many?

A We have nine tractors and twenty-nine trailers.

Q Did it ever occur that you would help load coils of steel on trucks at the Lorentzen plant going away from the plant?

A I didn't get it.

Q Did you ever load any trucks with coils of Weirzin steel?

A I did.

Q Upon how many occasions has this involved Mr. Franken, that you know of?

MR. SPILLERS: Your Honor please—

(tr 87) MR. MORGAN: I'll withdraw that, I'm sorry.

THE COURT: Yes, I am sure counsel was just slightly inadvertent there.

Q Between the dates of sometime in November of

1954 and sometime in August of 1955 did you load or help load any steel on trucks at the Lorentzen plant?

A I did.

Q If you remember, when was the first load that you helped put on the truck?

A January of '55.

Q And what were the contents of that load?

A Steel coils.

Q Describe these coils to the Court and jury, please.

A They are steel coils that run anywhere from twenty-five to thirty inches wide, and in different gauges, of either .014 gauge, .019 gauge, or .025 gauge.

Q That's the thickness?

A That's the thickness, and the width is about thirty inches wide.

Q And, if you know, how many pounds do these coils run?

A They weigh approximately anywhere from 5,000 pounds. They sometimes run as high as 6,000, but I believe the actual weight of them should read 5,000 pounds.

Q You say the first load that you helped load was in (tr 88) January of 1955, is that correct?

A Right.

Q How many coils were loaded at that time?

A Oh, I don't exactly know how many. I believe it was five or six.

Q How many trucks were loaded at that time, do you remember that?

A I believe it was one tractor.

Q How did you know to help load these coils, Mr.

Whitehead? How did you know to do that? How did you happen to be there?

A DeArdo would explain to me how much weight, or how many coils are to go on the trailer.

Q Did you know or did you not know that these coils were being stolen?

A I did.

Q And what would you do, if anything, in regard to the preparation of these coils for shipment?

A I would remove all tags and all markings.

Q How would you remove the markings?

A With sandpaper.

Q What kind of markings would appear on the coils to be removed?

A They were on by stenciled ink.

(tr 89) Q And what would the markings say?

A "Lorentzen Hardware Manufacturing Corporation," what gauge it would be, whether it be .014, .019 or .025, plus the weight of the coil.

Q And the weight of the coil would be stamped on the coil?

A Right.

Q Would the weight be otherwise indicated on the coil in any way?

A With a tag.

Q And whose tag was that?

A Weirton Steel.

Q Did your company have a tag on the coil?

A Yes, it did.

Q Which of the two weight tags did you remove, or

both?

A I would remove all markings and all tags.

Q Did you know any of these truck drivers personally?

A No. No, I didn't.

Q Do you recall the names of any of the trucking concerns that furnished trucks for this purpose?

A Yes, I do.

Q What were their names?

A Aetna Freight Lines, McCullough Transfer, is the ones that I remember.

(tr 90) Q Do you remember any others?

A There was—no, I don't.

Q You don't remember any of the others?

A No.

Q Were all these shipments of steel in coils?

A Yes, sir.

Q In mill width coils?

A Yes, they were.

Q If you remember, do you recall ever preparing a shipment in slit coils—smaller?

A No, I don't.

Q You don't remember that?

A No, sir.

Q So how many shipments, if you remember, were made over the period that I have previously asked you about?

A As many as I could count up would be twelve, twelve loads

Q Twelve loads?
A Twelve loads.

Q And how many shipments, if you remember? How many separate shipments?
A It would be about seven or eight, somewhere around there.

Q Were some of the shipments hauled in more than
(tr 91) one truck, or one trailer?

THE WITNESS: You mean—

Q At one time did they have more than one truck in there to haul a shipment out?
A Yes.

Q And what were the number of trucks when there were more than one? Was there ever more than two, for example?
A No, there was just two. Two was the most.

Q The first shipment you recall you say occurred in January, '55. How many shipments do you recall were taken out of there in January, '55, if there were more than one?
A I believe there was three. I can't exactly say.

Q There were shipments after that. When was the next shipment that you recall?
A February.

Q And how many shipments were made in February?
A Two.

Q And how many shipments were made later in the following month, if any?
A I don't remember any more in February.

Q What month followed that there were shipments in, Mr. Whitehead?

A May.

Q And how many shipments were made in May?

(tr 92) A I believe there was two in May.

Q Was that two trucks that got loads or was it one truck at separate times, or more than one truck at separate times?

A Two trucks.

Q Two trucks in May?

A Two trucks together.

Q In May?

A Yes.

Q Any in June, if you can remember?

A I can't remember the dates exactly.

Q Do you remember when the two trucks appeared at Lorentzen to haul steel out of there, when two trucks came in at one time?

A That was in, I believe, May.

Q Were there any later than that?

A The next shipment after May—there was two more—I mean, in the same month, I believe it was. There was two more at the same time.

Q I don't believe I understand your answer. There were two more at the same time?

A In other words, on the next shipment there was two tractors and trailers sent in again.

Q You have said that there were Aetna trucks and

(tr 93) also McCullough trucks. Do you remember at what times the Aetna trucks came in and at what times

the McCullough trucks came in, by any chance?

A The Aetna trucks, then two double loads of McCullough came in, then Aetna started hauling it again.

Q Do you remember the approximate time of the last shipment?

A August.

Q Of what year, please?

A '55.

Q Tell the Court and jury the procedure that you had when the trucks did arrive, the time of day or night they arrived, and what you would do and what they would do, what you transferred in the way of papers, or anything of that nature.

A I was usually called at home by the plant manager—

Q (Interrupting) What's his name?

A DeArdo. (Continuing)—and he would instruct me to go to the plant and load up whatever tractors was there. They would give me a pick-up slip that had marked on it how much weight they was to pick up, and from the weight that was marked on the pick-up slips we figured out between the 5,000 pounds coils to amount to the total load that was marked on the pick-up slips. That's how I would load it.

(tr 94) Q Would you take the pick-up order from the truck driver?

A Yes, I would.

Q And what did you do with it?

A I left it for DeArdo. The pick-up slips and weights and tags that I would remove I would bundle up and leave for DeArdo.

Q And what would you give the truck driver?
A Nothing.

Q Did he not know what was on his truck, as cargo on his truck?
A Actually, not except that the driver would be familiar with the steel, being as how he's hauled steel so much that he would know what it is, but he would ask me for a bill of lading—

Q Yes.
A (Continuing)—and I told him there was no bill of ladings, that I didn't make them out, all my instructions were was to load them; and I remember one driver,—not his name—

MR. SPILLERS (Interrupting): Just a moment, please. Your Honor, I don't want to interrupt to waste time, but there is testimony here about what the truck driver would ask him, and that conversation, of course, is improper. The truck drivers are summoned and they (tr 94½) can say, but I don't want this witness to get in any hearsay about what—

THE COURT: I understand, Mr. Spillers. You have a right to make your objections.

MR. SPILLERS: I object to that testimony.

THE COURT: And the jury should not consider any testimony of this witness as to conversations had with other people not in the presence of the defendant Franken; that is, any conversations had between this witness and the truck drivers should not be considered by you gentlemen. Is that satisfactory?

MR. SPILLERS: Yes, sir. Thank you, Your Honor.

Q What did the truck driver do after you told him there was no—

A (Interrupting) He wanted me to give him a bill of lading to prove that he had—that his load was legal.

Q Did you give him one?

A And I told him—no, I didn't, I didn't make out no bill of ladings, and he wanted me to take his load off, and I told him to back it in, that I would remove his load, but—

THE COURT (Interrupting): Mr. Witness, please do not detail the conversations that you had with these truck drivers. It is improper to go to the jury. Tell what was done, but avoid conversations.

(tr 95) MR. MORGAN: May it please the Court, if I may be indulged. I understood Mr. Spiller's statement and objection to be that the truck drivers could appear and testify as to what they said. Their statements would be just as inadmissible as this witness's in the normal case. However, there is a charge of conspiracy here and this witness, the Government contends, was a member of that conspiracy, and what he testifies to as to the reluctance of certain truck drivers to remove loads without bills of lading, we think is admissible.

THE COURT: They can tell what they did. This witness can testify that the shipments left there without any bill of lading. The truck drivers, if they subsequently got a bill of lading, can tell where they got it.

MR. MORGAN: That was not his objection in the first place.

THE COURT: He is objecting to conversations had between the truck drivers and this witness, which the

court believes to be improper.

MR. MORGAN: I understand, Your Honor.

Q Did you experience any difficulty in having any of these shipments moved away from the Lorentzen plant because there were no bills of lading to give to the drivers—without going into any conversations that you (tr 96) may have had with the truck drivers?

A All that would be done, the driver would ask for a bill of lading. I had no bill of ladings to present him with. He would call his dispatcher and the dispatcher would tell him to come on in.

Q How many times did that occur, if you remember?

A I believe on two drivers.

Q Did you ever give any driver, during this period, any bill of lading or any sort of a shipping order?

A I did not.

Q If you know, did anybody else at the Lorentzen plant during this period on these shipments give them any shipping order?

A That I wouldn't know.

Q But you did not?

A No.

Q I believe you testified previously that you had a conversation with Fred Franken at one time, is that correct?

A Later on, yes.

Q When was that?

A That was after the steal had been exposed—the theft had been exposed.

Q Did or did you not have a conversation with him in

his car concerning some money to go to DeArdo?
(tr 97) A Not in his car, no.

Q Where was it?
A He met me on the highway.

Q Where?
A On Freedom Way that joins to the plant. From Freedom Way there's an adjoining road that goes to our plant. He met me there.

Q At what date, if you remember?
A The first week in July—first or second week in July.

Q And what time of the day or night was it?
A In the afternoon.

Q And do you know Mr. Franken's car?
A Yes, I do.

Q Would you describe that for the jury?
A It's a 1953 Catalina Pontiac.

Q Was he driving that car on that occasion, if you remember?
A Yes, he was.

Q And did you talk with him upon that occasion?
A All he did was give me the money and say, "This is the money that you have—that you're to give to DeArdo."

Q And how much money did he give you?
(tr 98) A $500.00.

Q How did you happen to arrange to meet out there? Whose suggestion and whose direction was that?
A He called at the plant.

Q For whom?

A DeArdo was on vacation, and he called for me. DeArdo told him to have me get the money.

Q You don't know what he told him, actually? You weren't in that conversation?

A No, I wasn't.

Q Anyway, you say Mr. Franken called you at the plant?

A Yes, he did.

Q And what did he tell you?

A That he was in Mingo and that he would meet me there at the adjoining road between Freedom Way and our plant.

Q And what did he do when you met?

A He said he was going to Pennsylvania—he give—

Q (Interrupting) Did he give you anything?

A He give me the money.

Q What denominations was the $500.00 in?

A Fifty-dollar bills.

Q And what did you do with the fifty-dollar bills?

A I kept them until DeArdo asked for it.

Q And then did you send them to him or give them to him?

(tr 99) A Yes, I did, by Western Union Telegraph.

Q Did you retain any receipt for that money?

A Yes, I did.

Q Do you have it with you?

A Yes, I do.

Q May I see it?

Thereupon, the witness handed Mr. Morgan a paper.

MR. MORGAN: I ask that this, purporting to be a receipt from Western Union, be marked for identification as Government's Exhibit No. 2.

Thereupon, said receipt was marked Government's Exhibit No. 2 for identification.

MR. SPILLERS: If the Court please, the fact that there was money paid by this defendant, Mr. Franken, to Mr. Whitehead and Mr. DeArdo and the amounts, we will certainly admit that and show it, but it is submitted, Your Honor, that this particular receipt is not admissible for the reason that it's a transaction between different people and it in no way is connected to this defendant, so far as the receipt itself is concerned. For that reason we object to it.

MR. MORGAN: The Government contends that it is a transaction between two people, members of the conspiracy; testimony involving another to substantiate the (tr 100) testimony given by the witness in point of time and amount, and we think it is material and, as to its weight, it's up to the jury, but it should be admissible.

THE COURT: The court does not believe that it is particularly material to the issues in the case, but the court does not, at the same time, see how it could be particularly prejudicial to the defendant, so it may go in for whatever it is worth.

Thereupon, said receipt of Western Union Tele-

graph Company was received in evidence as Government's Exhibit No. 2.

Q Mr. Whitehead, did you ever see Mr. DeArdo and Mr. Franken talking in the office in the Lorentzen plant at Weirton, West Virginia?

A Yes, I would.

Q Were you ever instructed in Mr. Franken's presence to obtain a sample of Lorentzen Weirzin steel by Mr. DeArdo?

A Yes, I was.

Q Tell the Court and jury about that occasion, please.

A I came up to the office—

Q (Interrupting) Do you remember about the approximate time, please?

A The latter part of '54. I came up to the office and (tr 101) I seen DeArdo talking to Franken. At the time I did not know his name. They was discussing steel, scrap steel, at the time, and Franken claimed to have some type of a market for it, but he wanted to know exactly what it was. DeArdo asked me to go pick up a piece of a sample, which I had cut off of a piece of a coil and brought in and handed to DeArdo.

Q Did you see him looking at it, inspecting it?

A He handed it to Franken, and Franken was shaking it in his hand, and they began to talk, then they walked outside, the two together, and left me in the office by myself.

Q Do you know where they went?

A Well, I sort of looked out, and they was sitting in his, in Franken's car.

Q Is that the same Pontiac—
A (Interrupting) Same Pontiac.

Q You recognized it as being his car?
A Yes, I would.

Q If you know, do you know whether the Lorentzen steel plant, Lorentzen Hardware Manufacturing Company, is in the Northern District of West Virginia?
A Yes, it is.

MR. SPILLERS: We admit that.

MR. MORGAN: You may inquire.

(tr 102) CROSS EXAMINATION

BY MR. GOODWIN:

Q Mr. Whitehead, you are named a defendant in the same case in which Mr. Franken is named a defendant, is that correct?
A Right.

Q Has any action been taken on that case so far as you are concerned?
A I don't know what you mean.

Q Have you done anything in this court pursuant to that indictment?
A I still don't understand you.

Q Since the time that you were indicted in this case have you made any appearance in this court room?
A Yes, I have.

Q For what purpose?
A I have been asked questions.

Q Have you been in here for any other purpose?
A No.

Q Did you enter a plea of guilty in this case?
A Yes, I did.

Q And when did that take place?
A In December.

Q I will ask you whether or not you have made any (tr 103) statements to any person concerning this case prior to coming in here today?
A I did.

Q Were they written statements?
A No, they weren't.

Q You never made any written statement concerning this case to anyone?
A No, I didn't.

Q Were there any statements that you made taken down by a shorthand reporter or reduced to writing in any way, so far as you know?
A I believe there was.

Q When and where were those statements made and to whom?
A To the District Attorney.

Q When was that?
A Yesterday.

Q Before that time did you make any statement to anybody concerning this case when it was reduced to writing?
A I did.

Q Where was that done?
A To the company.

Q And when was that done?
A I don't remember the date. Been about a year ago.

(tr 104) Q Was that statement substantially the same thing you have told here today?
A Follows on the same thing.

Q There weren't any variations in the statement that you made to the company at that time and the story you are telling us here today, is that correct?
A At that time I knew more about it than I do right now—I mean, I could remember more about it.

Q But there is no inconsistency between the two, the statement that you gave the company a year ago and your testimony here today, is that correct?
A I don't understand that word.

Q What you told the company a year ago and what you told us here today are the same, is that correct?
A Yes, it is.

MR. GOODWIN: We have nothing further.

REDIRECT EXAMINATION

BY MR. MORGAN:

Q To refresh your recollection, Mr. Whitehead, do you remember talking to Mr. Macys at Weirton on June 19, 1956, and going to the Police Department?
A Yes.

Q Didn't you make and sign a statement at that time?
A Yes.

(tr 105) Q Had you forgotten?
A I did.

MR. MORGAN: You may inquire.

MR. GOODWIN: We have nothing further.

BY THE COURT:

Q Mr. Whitehead, there has been testimony here by a previous witness that certain moneys were paid to you which were supposed to be part of the proceeds of the sale of this steel. Did you get some of that money?

A I did not receive it, Your Honor.

Q You did not get any money?

A No, sir.

Q No part of it?

A No, sir. I was staked in poker games, is all the money that I have ever received.

THE COURT: That's all.

REDIRECT EXAMINATION

BY MR. MORGAN:

Q Do you have any idea what the amount of the stakes were?

THE WITNESS: In a poker game?

MR. MORGAN: Yes.

A Pretty high. It cost—we started out with a quarter limit, but by the time it would end up it would cost you (tr 106) twenty-five, thirty dollars, as high as fifty dollars, a pot.

Q As I understand your answer to the Court's ques-

tion, you said that he would stake you—DeArdo would stake you in the poker games

A He would.

Q And would that occur very often?

A About every other day.

Q And would he generally stake you every time you played?

A Yes, he would, just about every time.

Q Did he also pay to you some money that he had borrowed from your mother?

A He did not give it to me.

Q Do you know whether or not that was repaid—just yes or no?

A Yes.

MR. SPILLERS: Your Honor please, I will have to object to that. This is something that certainly is not in the nature of anything that Mr. Goodwin asked on cross examination—going into something about the witness's mother—and I submit that it is immaterial to this case.

MR. MORGAN: That's right, Your Honor.

THE COURT: Yes, it probably isn't too material. I (tr 107) expect the court, perhaps, by the court's questions, opened up that avenue of examination, Mr. Spillers, but I expect we have gone about as far as we need to go with it.

MR. MORGAN: Yes, sir, I am all through.

THE COURT: Any further questions of this witness?

MR. MORGAN: No further questions.

MR. GOODWIN: We have none.

* * *

(tr 268) * * *

PAUL DeARDO, who previously testified, thereupon resumed the stand and further testified as follows:

CROSS EXAMINATION (Cont.)

BY MR. SPILLERS:

Q You are Mr. Paul DeArdo?
A Yes, sir.

Q You testified here in this case on yesterday?
A Yes, sir.

Q There are one or two questions that I would like to put to you with reference to something that I understood, and I may have the wrong information. Who is your mother-in-law?
A Mrs. Lucille Harris.

Q The lady who just was in here?
A Yes, sir.

Q And was it her daughter that you married?
(tr 269) A Yes, sir.

Q Have you had any children from that marriage?
A No, sir. I have two stepchildren.

Q Her children?
A Yes, sir.

Q Had you had any children by a prior marriage?
A No, sir.

Q I will ask you to say, if you know, whether or not you ever told Mrs. Harris that you had been married be-

fore you married her daughter.

A Yes, I believe I did.

Q And would you say that she knew that fact when you married her daughter?

A I believe so.

Q I would like to have you tell the Court and jury whether or not since you married her daughter—some three years ago, was it?

A Approximately, yes, sir.

Q Have you all lived together continuously since that time?

THE WITNESS: Up to now?

MR. SPILLERS: Yes.

A No, we haven't.

Q You have been separated, haven't you?

(tr 270) A Yes, sir.

Q And she lived some place and you lived at another place?

A Yes, sir.

Q And do you know whether or not Mrs. Harris, your mother-in-law, was aware of that fact?

A No, I don't, sir.

Q You don't know?

A No.

Q Did you ever tell her?

A Not that I know of, sir.

Q There has been some testimony since you were here about the receipts to which you testified, and if I am

correct your testimony, both on direct and in answer to my cross examination, was to the effect that you kept no records of the payments made to you by Mr. Franken.

A That's right, sir.

Q You didn't have those entered in a memorandum or any ledger?

A No, sir.

Q And at the time you gave him certain receipts which were written out on scratch paper, or something, but later, at his request, you wrote out receipts on company paper and back-dated them?

(tr 271) A Yes, sir.

Q And that was done in the kitchen of Mrs. Harris?

A Some of it, sir.

Q Some of it?

A Yes, sir.

Q And who was present when you did that?

A Mrs. Harris and Robert Arnold.

Q And what part of the house were you in when this was done?

A In the kitchen.

Q And where in the kitchen?

A At the kitchen table.

Q And where were they at that time?

A Sitting at the table with me.

Q Both of them at the table?

A I believe so, yes, sir.

Q And did you show them what you were writing out?

A Yes, sir.

Q And at that time you just wrote those from your memory?

A No, sir.

Q And what did you write them from?

A Mr. Franken had given me a list of dates, approximate dates, that he wanted these receipts made out to, (tr 272) and the figures, and I had put them in a little notebook so that I wouldn't make out the wrong dates or the wrong figures.

Q Do you have that notebook with you?

A No, I don't.

Q Do you have it at home?

A I may have.

Q If you can find that will you bring it here with you tomorrow?

A Certainly, sir.

MR. SPILLERS: That's all, Your Honor.

* * *

(tr 351) FRED FRANKEN, the defendant, having been first duly sworn, thereupon testified as follows:

DIRECT EXAMINATION

BY MR. SPILLERS:

Q Your name is Fred Franken?

A Yes, sir.

Q Where do you live, Mr. Franken?

A Youngstown, Ohio.

Q And how old are you?

A Fifty-eight.

Q How long have you lived in Youngstown?
A About thirty odd years.

Q Are you married?
A Yes, sir.

Q Do you have any children?
A Five.

Q How old are they?
(tr. 352) A The oldest boy, I think, is thirty-one, thirty-one and a half; the youngest is either nineteen or twenty.

Q What business are you in, Mr. Franken?
A Well, you would say it's steel brokerage, in a sense.

Q How long have you been engaged in that?
A I think I first started in this in late '50 or early '51, I'm not a hundred per cent certain.

Q How much formal education or schooling have you had?
A Second year of high school.

Q Where was that?
A Struthers, Ohio.

Q When you started in this business around 1951 did you work for anyone in particular, any one company?
A No, sir.

Q Have you since that time been employed by any one company?
A No; I do business with, oh, half a dozen or so.

Q And where is your office?
A At my home in Youngstown.

Q What is that street address?
A 253 Laura Avenue.

Q Do you have any other business address where you appear at certain times?
A As a rule, once a week I go to Harmony Tool & Die in Mingo Junction, Ohio.

(tr 353) Q And how long have you been doing that?
A Oh, I think since the middle of '53, or late '53.

Q Directing your attention to the period beginning in the late summer or late fall of 1954, and going especially to the end of August or early September of 1955, I would like to have you relate to the Court and jury, first, when you went to a plant in Weirton, West Virginia, for the first time.
A I didn't understand the question, sir.

Q My question is, you were in the court room and heard the first Government witness, Mr. Paul DeArdo, testify about when he first made your acquaintance?
A I would say sometime in August of 1954.

Q Where did you meet him?
A At the office of the Lorentzen Hardware.

Q Please relate and tell the Court and jury everything you remember about how you met him, what occurred, and go right through the transactions as you remember them.
A Well, I first stopped at the Lorentzen Hardware on one of my trips towards Mingo Junction. I stopped at several places, such as in New Cumberland, the New Cumberland Metal Fabricating, and then I go down to Kusic-Haines, and when I left Kusic-Haines this particular day I stopped at Lorentzen Hardware, walked in the door—

(tr 354) Q Pardon me just a minute. Will you state to the Court and to the jury where Kusic-Haines Company is with reference to this Lorentzen Hardware Company?

A I would say it's about three hundred yards to the west of Lorentzen Hardware, on the same road, but the name of the road I would not know.

Q Incidentally, how long had you been making calls on Kusic-Haines?

A Oh, I think I started calling on Kusic-Haines sometime in '52 or '53. I don't remember when.

Q All right, you are calling now at Lorentzen Hardware.

A And I walked in the office—

Q By the way, how did you know the name of that company?

A There's a small sign over the door about that long and about that high (indicating).

Q What does that sign have, or what did it have at that time, if you recall?

A "Lorentzen Hardware Company," that's all I know. Of course, the words "Lorentzen Hardware" is all I—might have had one other, "Company" or "Incorporated." I don't remember that.

Q When you went in there what did you ask for?

A I asked for the manager, and there was a young lady there and I think she rang a buzzer, and in a short (tr 355) time thereafter a man appeared and he introduced himself as Mr. DeArdo, and I gave him a card of mine—you can't call it a business card; all it has is my name and my address and my telephone number.

Q Yes, sir.

A (Continuing) And I asked him if he had any surplus steel or any steel of any type to sell, and he said no, not at the time, and I asked him if he ever did, and he said they had from time to time. I asked him for permission if I may call back; he said any time I'm in the territory I'm welcome to stop, and after that I left and went down to Mingo. I might have stopped at Follansbee, because I did that quite a bit. I stopped at Fort Steuben Metal.

Q Just pass that and say when you next went back to this company.

A I think it was about two weeks thereafter, and I stopped again on my way.

Q Incidentally, tell the Court what type of automobile you had at that time, and during the years '54 and '55.

A '54 and '55 I had a Pontiac car. It was ivory and coral.

Q All right, sir, go ahead, then, back to your next visit. Tell what occurred.

A Well, I asked for Mr. DeArdo and he came out (tr 356) and he said he had nothing at the time. I think my third visit I don't think he was there, but I don't know, because one or two occasions I was informed by the girl that he wasn't in. Then I would say late October I made a stop, or the middle of October, and I received the answer that maybe when they took inventory they might have some surplus, in fact, they were looking at some rejects; whether they were going to use them or not he did not know then but he would let me know. I thanked him and left again. That day, when I got to Mingo there was a telephone call there for me, with a

number which I don't remember, and the only reason I remember the name is because I went up there afterward, from a Mr. DeGenero, and I returned the call, like I do for any calls that are left for me—that was one of many, but that one was there—and when I got him on the phone, I asked him, I said, "This is Mr. Franken, you left a call for me?" He said, "Yes." He said, "I understand you want to buy some steel." I said, "I'm always looking for steel, what have you got?" "Well," he said, "I don't have anything right now," and I said, "Well, then what are you calling me for?" The way he said, it, he said, "Well, I think you should see me." I said, "All right, I will see you," and he did provoke me a little bit by his manner of speech on the phone.

(tr 357) Q Well, did you see him?

A I said I would stop on my way home that evening, and I asked him where, and he said at the trucking company, which was on Stony Hollow Boulevard. So that evening on my way home I stopped, and I drove in to the parking lot that they have in there, and I didn't even get out of my car because someone came to my car, and this man who calls himself Mr. DeGenero—

Q Had you met him before?

A No, sir, and never saw him from that day until a half an hour ago here, or less than that. He came over and he said—I asked him what he wanted to see me about. He said, "Well, I understand you want to buy steel." I said, "That is my business," but I said "Who told you?" He says, "That doesn't make any difference." "Well," I said, "to me it does." I said, "I don't get this." Well, I can't tell you the whole conversation verbatim, but the gist of it was that I did try and find out who told him that I was—because I said to him then, I said—because I

knew that that particular day I had only made one stop and that was at Lorentzen Hardware—I said, "I don't know why you are calling me today," I said, "did you just find this out today that I want to buy steel?" and he said, "Well, I don't think that that enters into it.' And the way he talked to me—I said, "Well, I only made (tr 358) one stop today and that was at Lorentzen Hardware. Now, if you have something that you can buy all of their surplus steel, and so forth, tell me and it will be all right with me." He says, "I didn't say that." I says, "I didn't say you said anything"—

Q (Interrupting) Did you buy any steel from him?

A No, sir.

Q All right, after that what happened then, with reference—

A (Interrupting) He asked me then—he did tell me about a load of steel that the trucking company who he represented was supposed to have—

Q What he told you—Mr. Morgan hasn't objected, but I don't want you to go into any hearsay.

A Well, he offered me this steel.

Q But you didn't buy anything from him?

A No, sir.

Q What did you next do with reference to Lorentzen Hardware Company?

A Well, I went home then, I left and went home, I went back to Youngstown. Then the next trip down, which I would say was a week later, I stopped at Lorentzen Hardware.

Q That would be about what time of the year, Mr. Franken?

(tr 359) A It was in October. It was the last of October.

Q Yes, sir.

A (Continuing) And I asked for Mr. DeArdo, and when he come—when he met me I asked him, I said, "Last week I had a funny experience. When I got to the office there was a call from a Mr. DeGenero," and I said, "I went up to see him afterwards. He tells me someone told him that I was trying to buy steel but he won't tell me who." I says, "Do you know him?" and Mr. DeArdo said no, he did not know him. "Well," I said, "if you do, and if your company has a policy whereby he gets, or if there"—truthfully speaking, I don't know whether—I figured it was a close tie-up, or what it was—"just tell me and that's all right with me." He says, "I do not know," and at that time he said he might have some when he took inventory around the first of the month, and I said, "If you do, let me know."

I think it was sometime around the 5th or 4th, early November, the first part of November, I got a call that if I was still interested in buying steel he had a load of narrow coils ranging from three inches to twelve inches wide, they had pitmarks in them and the edges were crimped somewhat, and if I wanted them he would sell them to me. I asked him what he wanted for them.

Q I'm not sure—who do you mean called you?

(tr 360) A Mr. DeArdo.

Q Yes, sir.

A And he said he wanted $1500.00 but it had to be cash. I said I would let him know, and I called Sharon Steel and I asked Mr. Swanson if he was interested in buying this type of merchandise. He asked me the price,

and I said, "Jack, here's what they want for it, it's supposed to be around thirty-five or thirty-six thousand pounds, I don't know the exact weight, but I would like to make at least five, six dollars a ton," and he said, "That's perfectly all right, I can use them," and I said "All right."

With that I called Mr. DeArdo and told him that I was interested, and he wanted to know when I would bring the money down and I told him on my next trip, which would be—I asked him when the steel would be ready for shipment, and he said, "Sometime next week," and I said, "All right, I will bring it down," and I brought him $1500.00 down and I brought it right to the plant and he gave me a receipt (reading from paper) "Received from Fred Franken"—he hasn't got my name spelled correctly—"$1500.00, Paul DeArdo, Manager," but there's no date on it.

Thereupon, said receipt was marked Defendant's Exhibit No. 10 for identification.

Q I hand you what has been marked for identification (tr 361) as Defendant's Exhibit No. 10, which you have described as an undated receipt. That was given to you, you say, by whom?

A Paul DeArdo.

Q Where did that take place?

A In the office of Lorentzen Hardware.

Q And at that time had you received the steel?

A No, sir.

MR. SPILLERS: I move the introduction of this into

evidence, Your Honor.

MR. MORGAN: No objection, Your Honor.

THE COURT: It may be admitted.

Thereupon, said receipt was received into evidence as Defend 's Exhibit No. 10.

Q Mr. Franken, after this occurred how much later was it before arrangements were made for the movement of this steel?

A Well, I don't remember what date he told me the trucks would pick it up, and when I first talked to him he didn't say anything about coming any particular time, so when I made arrangements I called Aetna Freight Lines and asked him if he had equipment that he could haul approximately 5,000 pounds of steel--it was 35,000 or 36,000 pounds, is what it was supposed to be--and I told Mr. Ritchason where to go, down to the Lorentzen (tr 362) Hardware, pick it up, and ship it to Sharonsteel Products, which I do--which I had done always before and still do whenever I have any transactions such as that.

Q Mr. Franken, in talking to Mr. Ritchason, will you say what, if any, other information you might have given him about moving this particular load, the first one, or any other load, if you remember.

A Well, I have given it different times when--and the next time that was delivered to Sharonsteel, and a day or two after that I went over there and picked up a check for it.

Q And what amount did you receive for it?

A $1706.00 and some odd cents.

Q And you made from this transaction for yourself how much?

A $206.00 and the odd cents.

Q Do you know what percentage that would be?

A That figured a little better than $5.00 a ton, for the reason that he charged me on a load basis and the steel, when it was delivered to Sharon, came to 42,000 pounds.

Q When was your next transaction?

A The next transaction was sometime in—he called me sometime in December.

(tr 363) Q Who called you?

A Mr. DeArdo—or I think I stopped there about the middle of December, and he said possibly when they take their yearly inventory they would have some more steel, but this steel would be more expensive because it was wide coils, 30 inches wide, and that he would let me know. So, I would say it was just before Christmas, he called me and he said they will have—they figured they were going to have in excess of maybe 50,000 or 60,000 pounds of steel sometime right after inventory, and he wanted to know—wanted a deposit, which I said I would give him, and he sent at that time, I think it was Mr. Stewart, and Mr. Stewart came up and I gave him $2500.00.

Q Came up where?

A To my home. I wanted to give him a cashier's check but he said his orders were that the company would only take cash.

Q And what were the denominations, if you remember?

A I'd say fifty and hundred-dollar bills—the largest denomination to make the smallest package.

Q And did you receive a receipt for that?

A Not from him. I received a receipt on my next trip down from Mr. DeArdo.

Q Do you have that receipt?

(tr 364) A Yes (handing paper to Mr. Spillers). That one's not dated either.

Thereupon, said paper was marked Defendant's Exhibit No. 11 for identification.

MR. SPILLERS: Your Honor, I move the introduction of this in evidence as Defendant's Exhibit No. 11.

MR. MORGAN: No objection by the Government, Your Honor.

THE COURT: Very well.

Thereupon, said receipt was received into evidence as Defendant's Exhibit No. 11.

Q I hand you Government's Exhibit No. 11. Tell the Court and jury when and where you received that receipt.

A At Lorentzen Hardware Company.

Q When?

A Oh, I think I received this shortly between Christmas and New Year's, after Mr. Stewart was at my home.

Q And at that time had you received the steel for this?

A No, sir.

Q Please relate when you received the steel and who made the arrangements for shipping it and who hauled it.

A I think I called Aetna Freight Lines again and they—told him that the steel would be ready sometime in the following week, and at that time I had been advised that the steel would be taken out after five p. m., because there was a paint line which they did not want (tr 365) to disturb and therefore they would rather the trucks come down.

Q Who advised you of that?

A Mr. DeArdo.

Q Right at this point, tell the Court whether or not you dealt with any other official of the Lorentzen Company other than Mr. DeArdo.

A I have never dealt with any other person in any capacity, outside of when he would send his workmen up for the money, but they were not—I never knew what capacity they were in the employ of Lorentzen Hardware.

Q And to whom was this steel sold?

A Sharon Steel.

Q And what did you receive from that shipment?

A Well, there was two shipments there. He called me later and said that there was more and he wanted another $2500.00, which he got shortly after—I think the 2nd or 3rd of January, and he sent up again for it. Then the steel—

Q Who came that time?

A Jess Whitehead. At that time I didn't know his last name.

Q Is that the same Mr. Whitehead who was the second witness for the Government?

A That is right, sir.

(tr 366) Q And where did he come to to get the money?

A To my home.

Q And do you have a receipt for that?

A I got a receipt when I come down to him after the steel had been delivered. He gave me a receipt that day. I had also paid in between that time another thousand dollars that he wanted, and he didn't give me a receipt for the thousand because on this receipt, and that's the one he said he made a copy, it says, "Received of Fred Franken"—

Q Never mind that.

Thereupon, a paper was marked Defendant's Exhibit No 12 for identification.

MR. SPILLERS: I move the introduction of this exhibit into evidence, Your Honor.

MR. MORGAN: No objection, Your Honor.

THE COURT: It may be admitted.

Thereupon, said receipt was received into evidence as Defendant's Exhibit No. 12.

Q I hand you Defendant's Exhibit No. 12, and ask you to relate what that is, who gave it to you and when you received it.

A I received it on the 13th day of January, 1955. It says, "Received of Fred Franken $2500.00 payment in full for Weirzin coils." The reason that says on this particular one—

(tr 367) Q (Interrupting) Excuse me. Is it signed?
A Yes, sir, "Paul DeArdo, Superintendent."

Q And I will ask you to say if you were present when Mr. DeArdo wrote that.
A Yes, because I had wanted a receipt for another thousand that I had given him.

Q Yes, sir.
A And he says, "Well, I'll put on this one 'Paid in full' so that will suffice."

Q Did that include the additional thousand dollars?
A No, he didn't give me a receipt. He just put on "Payment in full for Weirzin coils." He said, "That will answer for it because it's 'in full.' It says that on this."

Q And relate when this shipment was made and who made it.
A Aetna Freight Lines hauled it, and it was made to Sharonsteel Products.

Q In your dealings with Mr. Jack Swanson—
A Yes, sir.

Q (Continuing)—who was the sales manager up there, on this particular transaction, or these transactions, where you were selling steel acquired from the Lorentzen Hardware, or from its manager, Mr. DeArdo, did you conceal from him where the steel was coming from?
(tr 368) A No, sir.

Q What, if anything, did you arrange for with Mr. DeArdo or anyone up there about the making up of the shipment and the way it would be labeled?
A I made no arrangements with him, outside he told me approximately the weight that would be available, and I sent the truckers in and I got the weights for

Sharonsteel from the trucking company, because he charged me per load.

Q What did you make for your commission or your profit on this transaction, if you know?

A On the two truckloads I made four hundred and some odd dollars.

Q And that is approximately how much per ton, if you know?

A I would say it's around $5.00 or $6.00 a ton.

Q What was your next transaction?

A My next transaction was sometime in February. At that time he gave me—said he had one load of steel, and for that load of steel he wanted $1750.00, which I paid him for. I have my receipts here.

Q Excuse me, Mr. Morgan has asked me, when you are saying what you received, are you referring to your receipts there?

A Yes, sir.

(tr 369) Q Very well. And did you pay him that amount?

A Yes, sir. When I gave this, he sent up to my home again, and again none of them are dated. This is for $1600.00, but I gave him another $150.00 which I don't have a receipt for.

Q Who was sent to your home on this occasion, if you know?

A Sir, for me to sit here and tell you which one came for which in each and every instance, I couldn't be truthful with you. It was either Whitehead or Mr. Stewart. He sent an employee of the company.

Q To your home in Youngstown?

A To my home in Youngstown, yes, sir.

Thereupon, two papers were marked Defendant's Exhibits Nos 13 and 14 for identification.

MR. MORGAN: The Government has no objection, Your Honor.

MR. SPILLERS: I move their admission into evidence, Your Honor.

Thereupon, said two receipts were received into evidence as Defendant's Exhibits Nos. 13 and 14.

Q Handing you Exhibit No. 13 and also No. 14, I will ask you to examine them and say what they are.
A These are receipts given to me by Paul DeArdo.

(tr 370) Q And for what amounts?
A For $1600.00, these two are.

Q Well, the first one is No. 13 and is for what amount?
A No. 13 is for $1,000.00; No. 14 is for $600.00.

Q I believe you stated that you gave Mr. DeArdo an additional amount for this particular purchase.
A Yes. I didn't have enough with me. I had money, but I needed some extra money and I asked if I could give it to him the next time I saw him, which I did.

Q And how much was that?
A A hundred and a half.

Q And was that paid before the steel was shipped?
A No, I think he trusted me for the $150.00.

Q Where was this steel sold?

A To Sharonsteel Products.

Q And who made arrangements for the delivery of that load?

A I did.

Q And are you able to tell the Court and jury what you received for this transaction?

A I think it was eighteen hundred and fifty-nine or seventy-nine dollars. Something in that figure.

Q And when was your next transaction with Mr. DeArdo or the Lorentzen Hardware Company?

(tr 371) A In March.

Q And what was that transaction?

A That was for one load of steel, which I paid him $1850.00 for it.

Q You may say whether or not you paid that before or after this steel was delivered.

A I paid him for the steel—he would either send up for it and get it or I would stop. If he called me while I was in Mingo and said that there would be a load of steel I would stop and I would give him, if I had that much money, a deposit, and then he would send up for the rest of it.

Q Do you have receipts for that?

A Yes, sir.

Thereupon, a receipt was marked Defendant's Exhibit No. 15 for identification.

MR. MORGAN: No objection.

MR. SPILLERS: I move the admission of this exhibit

in evidence, Your Honor.

THE COURT: It may go in.

Thereupon, said receipt was received into evidence as Defendant's Exhibit No. 15.

Q I am handing you Defendant's Exhibit No. 15. Examine that and tell the Court and jury what that is.

A No. 15 is a receipt for $1,850.00, signed by Paul (tr 372) DeArdo, Superintendent, in both instances, and there's no dates.

Q Wait a minute. I understood you to say that is a receipt for $1,850.00.

A One of them is a thousand and the other is $850.00.

Q And were they both signed by Mr. DeArdo?

A Yes, sir.

Q Were you present, Mr. Franken, and did you see him sign that?

A He signed them all in my presence.

Q And where did he deliver those two receipts to you?

A I always got my receipts from him down at the plant.

Q At the time you received these two receipts had he delivered or had you already picked up and moved the steel which was represented by these papers?

A No, I had paid for it before I got the steel.

Q And where was that steel sold?

A To Sharonsteel Products.

Q And do you know who delivered that?

A I think Aetna Freight Lines.

Q When was the next transaction?

A The next transaction was in May.

Q And what was that for?

A It was for two loads of steel.

(tr 373) Q What was paid for that?

A For the two loads, $4500.00.

Q And do you remember how you paid for that?

A I gave him a thousand dollar deposit when he informed me of it. He sent up and got two thousand and fifteen hundred.

Q Do you know who he sent up for this?

A It was either Whitehead or Stewart. I don't remember which one.

Q And where?

A To my home. Oh, I'm sorry, sir. May I—I just remembered that that's the one, that $1500.00 on there—may I see that?

Thereupon, a receipt was marked Defendant's Exhibit No. 16 for identification.

THE WITNESS: I gave him $1,000.00 deposit.

MR. SPILLERS: Let the District Attorney see this.

MR. MORGAN: No objection.

MR. SPILLERS: I move the admission of this into evidence, Your Honor.

MR. MORGAN: No objection, Your Honor.

THE COURT: It may be admitted.

Thereupon, said receipt was received into evidence as Defendant's Exhibit No. 16.

(tr 374) Q Mr. Franken, I hand you Defendant's Exhibit No. 16, and ask you to say what it is and identify the signatures on each of those three separate papers.

A No. 16 is a receipt made out to Fred Franken for $1,000.00, signed by Paul DeArdo, no date; the second is a receipt from Fred Franken, $2,000.00, signed by Paul DeArdo, Plant Manager, LL, no date; the third one is a receipt from F. Franken, $1500.00, Paul DeArdo, Superintendent.

Q Do you have any other testimony to give concerning that transaction?

A Yes, I would like—Mr. Stewart, when he was here, said he met me on Stony Hill Boulevard, Hume's Trucking.

Q Yes, sir.

A If I may, I would like to say how I come to meet him there.

Q You may go ahead and if it's improper the District Attorney will stop you.

A On my way down to Mingo on that particular day I stopped at a little dairy restaurant there this side of Toronto—going from this way up it would be on this side of the city of Toronto—and I had a sandwich there and I called Mr. DeArdo and I said that I had the money with me but I would like to stop on my way back home from work, I would try and see him somewhere around four-thirty if that would be satisfactory to him, because (tr 375) by going over there it would delay me quite a lot, and he said he was sorry, he'd like if I would bring

it over, and I said, "Well, gee, I do have some things I've got to do," and he said, "Well, I've got to go away and I want to get this thing straightened out before I leave," and I said, "Well, then, how about meeting me over at the end of the bridge as I come past, I'm in Toronto now and it won't take you long to get to the end of the bridge, and then I can just give it to you, because it's $1500.00, and you can go, and I can go on down to work and I won't lose any time," and he said, "Well, it would be pretty difficult to meet at the end of the bridge," because of the work that was going on there, around there—there was some—they were moving that hill, and the road work that was there. He says, "I'll meet you down on Stony Boulevard," he said, and Humes would be a good identifying place. He says, "You know where that's at," and I said, "I do." So when I come down, I was a little longer because there was one-way traffic and I had to go up over the hill—I think it's called Paddy Run Boulevard or Paddy Run Road—it's a detour—and I had come over and coming down Stony Hill Boulevard, that's the way it comes down, and when I was coming down, why, Stewart evidently saw me coming down because he stepped out and waved me down, and I stopped and I asked where Paul was and he said, "Well, he sent (tr 376) me over." I said, "All right," and I just handed him the envelope, and that was it.

Q At the time you made these payments had you received this steel?

A No.

Q And where was this steel sold by you?

A To Sharonsteel.

Q And do you know what Sharonsteel paid you for

that?

A Well, they were paying me a little more right along. As he raised the price on me I told Jack I would stay within that average, and I averaged the whole thing around $6.00 a ton—six or eight dollars, some might have been more, but it averaged $6.00 a ton.

Q What was your next transaction?

A The next transaction was in June.

Q And did you call on Mr. DeArdo?

A I did.

Q And when in June, if you recall?

A Oh, I don't know just when. I know that I called on him in June and I got two loads of steel from him.

Thereupon, a paper was marked Defendant's Exhibit No. 17 for identification.

MR. SPILLERS: I move the admission of this into evidence, Your Honor.

(tr 377) MR. MORGAN: No objection by the Government.

THE COURT: It may go in.

Thereupon, said receipt was received into evidence as Defendant's Exhibit No. 17.

Q Mr. Franken, I hand you Defendant's Exhibit No. 17. I will ask you to examine the three papers and tell the Court and the jury what they are, what they represent.

A No. 17, one receipt, is "Received from Fred Franken $1,000.00, Paul DeArdo," no date and no identification mark as to his capacity. The next one is "Received from F. Franken $2200.00, P. DeArdo, Superintendent," and there's no date. The next one is "Franken, $1500.00, Paul DeArdo," also no date.

Q And who gave you these?
A Paul DeArdo.

Q And where did he give you those?
A At the Lorentzen plant.

Q And that was in what month of 1955?
A June.

Q Was that before you had received the steel?
A Yes.

Q And to whom was this steel sold?
A Sharonsteel.

(tr 378) Q And what did you receive from that transaction, if you know?

A I think it was around forty-seven fifty, forty-seven sixty.

Q And I believe you said—correct me if I'm wrong—that this and all the transactions you had with Mr. DeArdo was by cash.

A That is right, sir. That's the way he wanted it.

Q And when was your next transaction?
A The next transaction was in July.

Q And what did that represent?
A This represented for two loads of steel, and this here—

Q Let me have that first.

Thereupon, a receipt, consisting of three sheets, was marked Defendant's Exhibit No. 18 for identification, and was handed to the Court.

THE COURT: What is this third paper?

MR. SPILLERS: I don't know. That's the way it was, and the defendant can explain it, but if there is any objection we can take that off. I move the admission of this into evidence, with the understanding that if the one paper has no connection with this it will be withdrawn.

MR. MORGAN: With that understanding the Government does not object.

(tr 379) THE COURT: It has nothing on it but a signature. It wouldn't represent anything so far as we know now.

MR. SPILLERS: That's right.

Thereupon, said receipt was received into evidence as Defendant's Exhibit No. 18.

Q I hand you, Mr. Franken, Defendant's Exhibit No. 18, which is three papers, and ask you to examine them and state what they are.

A This No. 18 is one receipt for $1500.00, "Received from Fred Franken $1500.00, P. DeArdo, Plant Manager."

Q It is not dated?

A No, it is not dated. The next one is, "Received from Fred Franken, $1,000.00, P. DeArdo, Superintendent." This one here was a receipt for $3,000.00. How

it got mutilated I do not know. I didn't want to tear it off. It possibly happened because I had a tragedy at my home at this particular time and it could have been in that manner, I don't know, but I know I paid him $3,000.00.

Q In connection with this shipment that you are speaking of in July?

A Yes, right at this time.

Q But you have no amount shown on that third paper?

A The only part you see where it's there, it has been, you can see the aughts, and so forth.

(tr 380) Q At the time you paid this money and received the receipts, had you received the steel, or was this the same as your previous transactions?

A No, I hadn't received the steel. In fact, that particular steel, I paid for that, oh, I would say around the 15th of the month, or thereabouts. It was supposed to be shipped out right away. It wasn't shipped out. In fact, I received a telegram—I didn't know it hadn't been shipped out—

Q Yes, sir.

A (Continuing) Prior to this here I had gone to Detroit on business, and I was traveling on the 18th day of July between Detroit and Chicago, and I was paged on the train, and was notified that my daughter had had an accident.

Q Well, at the time that you got that notice did you also receive some other wire with reference to business?

A No. I had to travel to Chicago, and I couldn't get any plane, or anything out. At that time I didn't know she had died, and I came home on the midnight train

out of Chicago. The railroad was very good to me, made connections for me. I would say it was on the 19th, or it was on the 19th she was killed. On the 20th I received this telegram—

Q (Interrupting) Let me have it identified first.

Thereupon, a telegram was marked Defendant's
(tr 381) Exhibit No. 19 for identification.

MR. MORGAN: No objection.

MR. SPILLERS: I move the admission of this exhibit into evidence.

MR. MORGAN: No objection by the Government, Your Honor.

THE COURT: It may go in.

Q I hand you Exhibit No. 19, and will have you state to the Court and jury what it is.

A I received this telegram on the 20th. Whether I read it on the—all it says, "Unable to load steel until 7-30, will call you 7-24 and explain, Paul DeArdo." I think he did call me either that day or the next, and he said—

Q Well, wait, I want to ask you, is that in reference to the transaction that you have spoken to?

A Yes, sir.

Q And where did this steel go, if you know?

A Chicago.

Q And who hauled that steel?

A I think it was McCullough Transfer, I'm not

sure. Maybe it was Aetna, but in the transaction there was a couple loads that was handled by McCuilough Transfer because Aetna did not have trucks.

Q And is that the steel which was received by the Superior Steel Supply that Mr. Borenstein testified regarding yesterday?

(tr 382) A Yes, sir.

Q And what other purchase did you make from him?

A I made one more.

Thereupon, a receipt was marked Defendant's Exhibit No. 20 for identification.

Q The paper you gave me, does this reflect the last transaction you had?

A Yes, sir.

MR. SPILLERS: I move the admission of this into evidence, Your Honor.

MR. MORGAN: No objection, Your Honor.

THE COURT: It may be admitted.

Q Handing you Defendant's Exhibit No. 20, two papers, I ask you to examine them and state what they represent.

A One is "Received from Fred Franken"—a receipt for $2100.00, "Paul DeArdo, Superintendent." The other one is a Western Union receipt which I sent for $1200.00, sent to Paul DeArdo, care Lorentzen Hardware, Phone 880, at Weirton, or 4797, West Virginia Exchange.

Q And that's for how much?

A $1200.00.

Q And is this in payment of the purchase made, the last purchase you made?
(tr 383) A Yes. The telegram—he called me—I was in Chicago—can I say why I was in Chicago?

MR. SPILLERS: Yes, sir.

A This tragedy that I just spoke about, my daughter—this youngest daughter was supposed to be married on the 23rd or 24th of July. Instead of going to a wedding we went to a funeral. So her fiance was from Chicago, and she didn't want to get married at home then because of the tragedy, so I agreed to take her to Chicago the first part of August and she would then be married there, which I did, and I think it was the night of August 4 I got a call from Mr. DeArdo in Chicago asking me if I wanted another load of steel. I said, "Well, I suppose I did," but, I says, "I'll be home in a couple of days, I'll see you then." He says, "Well, if you don't want it we can sell it to someone else." I said, "Well, I'm out here in Chicago, I just don't know how much money I can gather together." He said, "Well, if you want it, why, send me $1500.00." I couldn't get fifteen hundred together but I got twelve hundred and I did wire that, and when I came back I paid him the balance, which was the following Tuesday or Wednesday.

Q From your recollection, was this one money order for $1200.00 the only time in any of your transactions with Mr. DeArdo that you did not pay cash?
(tr 384) A Yes, sir.

Q You heard some testimony by Mr. DeArdo, I believe it was, to the effect that on one time he received a money order for, I believe, $1368.00 or some such amount?

A Thirteen fifty or fifteen hundred. I don't know.

Q Well, would—

A (Interrupting) That would be the one.

Q This would be the one?

A Yes, sir.

Q To whom was this steel sold, if you know?

A To Chicago, to Superior Steel Service.

Q I will ask you, sir, if what you have testified to concerning these dealings with the Lorentzen Hardware and Mr. DeArdo, you have on some prior occasion before any charge was lodged against you given this same information to some agency of the Government.

A Yes. I think I was contacted sometime in January, or thereabouts.

Q Of what year?

A '56.

Q Last year?

A Yes, sir.

Q And in that account or statement that you made, did you or did not say to whom you had sold the steel and where it was delivered and who delivered it?

(tr 385) A Yes, sir.

Q And did you in any way give a different version than you have given here on this witness stand?

A I don't think I did. I think I talked to—the agent's name was Mr. Howard.

—o—

Thereupon, an adjournment was had in these proceedings until two o'clock p. m.

—o—

AFTERNOON SESSION

Court was resumed at two o'clock p. m., pursuant to the forenoon adjournment.

PRESENT: The same parties as noted at the morning session.

FRED FRANKEN, the witness on the stand at the time of the adjournment, thereupon resumed the stand and further testified as follows:

DIRECT EXAMINATION (Cont.)

BY MR. SPILLERS:

Q Mr. Franken, directing your attention to what you have testified to as to being your last transaction with the Lorentzen Hardware and Mr. DeArdo in August of 1955, please state when you next went back to the plant, if you did go back there.

(tr 386) A I stopped at the Lorentzen Hardware plant, I would say, somewhere between the 20th and 25th, 26th, of August, 1955.

Q Was that to purchase additional steel?

A I would have asked that question had the opportunity been given, but it was primarily to make a complaint for shortages on the last steels that had been going to Chicago. I went into the plant, the same as I usually do on my way down to Mingo, and I drove up to the plant, got out of my car, and I noticed there was a car with a foreign license on standing right alongside of the building, with a gentleman with his back towards me putting something in the trunk of his car. I went into the office

and asked the girl, as I had done on previous occasions, for Mr. DeArdo. There was also standing there a gentleman in his shirt, without a coat on. The girl informed me that Mr. DeArdo was back taking inventory, and she seemed to be hesitant in calling him. So, because I had a complaint that I wished to make I did say to her, "Well, can't I see him for a few moments if he's just taking inventory?" While I was there waiting for her answer I noticed she looked at this gentleman who was standing alongside of her and he looked at her. Out of the corner of my eye I could see that he motioned "yes" with his head. She said then she would call him. Well, I stood (tr 387) there in the middle of the floor—there's no chairs there, were none at that time, anyhow—and she was staring at me and the other fellow was staring at me, so it become a little embarrassing for I had been there, I don't know, seemed like five or ten minutes waiting for him to come out, and it had rained earlier and it was a little oppressive that day, so I said, "I'll step outside here, right here, until he comes out," figuring that she would call me. So I stepped outside, and I was throwing some pebbles in some pools of water that were out there when he come out—he come outside—and I greeted him the same as I always did, and said, "You seem to be busy today." He said, "Yes, a little bit," he says, "we're taking inventory." "Well," I said, "you have to do that occasionally, too." But he seemed to me as if he was somewhat disturbed, so I said, "Well, there's a couple things I want to discuss with you about some shortage in Chicago," and he immediately said, "Don't talk to me about shortage, I've got some shortages here." "Well," I said, "I hope you're not involved in anything like that." He said to me, "What do you think?" I said, "Well, now that you've put it to me that way, I don't know what to think."

He said, "I'll talk to you later, I'll call you." I says, "All right, then," and I left.

Q And this was in the latter part of August?
(tr 388) A This is the latter part of August of 1955. I think I waited a week for a call. I got none. So I called down at Lorentzen Hardware, but I could not reach him by phone. I then tried to reach him at his home. I couldn't reach him. However, I decided that there must be something wrong, so I thought I would call, and I called late at night one night, straight through, about one o'clock in the morning, and he answered the phone. I said, "I've been trying to reach you for the past two weeks, you were going to call me. What's it all about?" He says, "Oh, we got a shortage," and I said, "Well, tell me, what is it all about?" "Well," he said, "I don't want to discuss it on the phone, I'll come up and see you." I says, "All right, do that."

I think I waited a week or ten days before he came up, and he came up in the company of Mr. Whitehead, and I would say it was around five, five-thirty, in the evening. They come into my home, and I invited them down to my recreation room. I've got a small room down there and asked them if they cared for a drink and they said yes, and I poured them a drink. We went into the laundry room which is adjacent, that's where the water is, and they took water. Mr. DeArdo stood over there by a laundry tub. Mr. Whitehead was over by the Laundromat on his haunches. I stood over by a refrigerator. I said, "Well, let me hear, what's this all about?" Paul (tr 389) said, "You tell him, Whitehead," so Whitehead proceeded to tell me, and this is the story that Whitehead told me: That they thought they had a good thing.

I said, "What do you mean, a good thing?" "Well, we, Paul, myself and the slitterman"—I never knew him by name—"decided that we could rig our inventory"—I don't know whether he used the word "rig," now, but in sum and substance, and they would have that much steel left over, each and every month and they could sell it. My remark to that was this, "You two fellows ought to have your heads examined. I can understand that a man might get away with one or two loads of something like that a year, but when you sell steel every month, one and two loads, how you figured you'd get away with it I have no idea, because, if your company"—and I have worked for some big companies in my former years—"would get that there and their scrap loss was increasing percentage-wise, would shoot up, somebody was going to ask about it and would say 'This has to stop.' How you figured you'd get away with anything like that I have no idea. You just must have been out of your minds." "Well, that's what we did." And that is the first time in my entire transactions that I had knew that the steel that I had obtained had been stolen. Prior to that I didn't. When he said what he said to me on August, between August 20 and 25, there, I didn't know what it was all about.

(tr 390) Q Leaving that just a moment, Mr. Franken, you were in court and you heard Mr. DeArdo give testimony substantially to the effect that after you had called on him two or three times you told him that you knew that he was selling steel to other people and that if he didn't sell it to you you were going to go to headquarters, to the head office.

A I never made a remark like that, ever. I wouldn't do it. I don't think it's ethical, and if you would do it you don't obtain anything anyhow, because you become

a tattle-tale, and if they want to give it to somebody else and don't want to give it to you they're not going to give it to you, period. The only thing I could have said in my first—and I think I did say it—my first coming in contact with Mr. DeArdo, is that I, being a broker the way I am, can only deal with a few people and I do not charge. I do usually charge two, three, four or five dollars a ton. And even when buying—when you buy and sell something, if a broker really buys and sells, he sells at ten, fifteen, twenty dollars a ton over what he bought it for, paid for it, but I don't, and I did say that he would make a better showing with his company if he sold steel to me rather than others, because he would get more from me. That would be the gist of what I did say. Verbatim, I can't repeat it, sir.

(tr 391) Q I don't know whether you answered this or not, but I should like to have you state whether or not you ever went to Hoboken or to any place where there were officials of the Lorentzen Hardware Company who had authority over Mr. DeArdo.

A I did not know at that time, or until sometime late in August or early September of 1955, that Lorentzen Hardware had an office at Hoboken, New York, or any place else. As far as I was concerned, that place down there was a locally-owned concern. It's a quonset hut manufacturing plant. I have never been past the front door of that place. I have never been inside of it. I don't even know how they make it, what they make, what machinery they have, or anything else about it. So I did not know that there was a Hoboken office or any other office.

Q You may say whether or not at any time you indicated, or by words or by implication threatened Mr

DeArdo.

A No. I wouldn't do that. How could I threaten him? I knew nothing.

Q I will ask you if, at the time Mr. Stewart or Mr. Whitehead came to you to act as a messenger or as a carrier, on those occasions, whether or not you had been advised that they would be there.

A Yes. Mr. DeArdo would call me and say, "I'm sending Jess up," or "I'm sending Stewart up, because (tr 392) I want the money, I've got certain things I have to do here, and will you please give it to him because I can't wait until you come down," and I said it was all right, I had no objection to it. So he always when he sent his men up he advised me that he was sending them up.

Q There was some testimony—

A (Interrupting) And they were workmen of the Lorentzen Hardware, so I had no thing—in fact, I asked both of them on my first meeting whether they worked for Lorentzen and they said they did.

Q There was some testimony to the effect that it was a part of the arrangement that there should be no writing or record kept of any of these shipments.

A There was no such arrangement made because he gave me a receipt for my money, so that is some paper. As far as records that truckers get from a place that you buy merchandise and you send a truck in after it—and I think I said this to the Federal man, also, because I think he asked me that question, and I told him at that time I knew of no reason for doing it. I didn't know it was compulsory, and as of this moment I don't know whether it has to be or not, and I have done it all the time that I

have been in the steel business, even up until now.

(tr 393) Q During this period of '54 and '55, I would like to have you state whether or not you had a bank account and paid some of your purchases by check.

A No, sir, I did not have a bank account.

Q There is some testimony in here that you tendered a check on one occasion.

A I told him I would go up and get him a cashier's check; in fact, I had a cashier's check for $1500.00, and I tendered it and I wanted to endorse it, and he said no, it had to be in cash, that was his orders; and I said, "All right," and he went over to the bank with me and I had it cashed and I put it— the bank put it in an envelope and I handed it to him.

Q During this particular period and, for that matter, since, I would like to have you state whether on other occasions you have paid for steel to plant managers and paid them in cash.

A Yes, I can enumerate them. The gentleman that testified here, Norman Johnson, I bought several hundred tons from them. One time I gave Norman Johnson at his office at the Sheet Metal Division of Follansbee Steel $10,000.00 in cash money, currency. I have given to the purchasing agent of Youngstown Steel Car Company $3500.00 and $4500.00 at different times for high tensile strength steel.

(tr 394) Q That's in cash, you mean?

A In cash. I have given to Joe Stearn of the Fort Steuben Metal Company as high as $15,000.00 in cash, and on other numerous occasions five, four or three, whatever it is. He sold to me only for cash. In fact, he was very specific he would take no checks.

Q There is some testimony in this case by the Government about the prices that you paid and received for this prime steel, or steel that was not scrap or had not been worked in some manner, and I would ask you whether or not at my request you did make an effort to get trade papers or information to show what the price was during this period of time.

A Yes, I have written to the Metal Market last week and asked them if they would send me papers, any one at all, for part of the year—the latter part of the year of '54 and some of early '55—if they would. I have some of them here that they sent.

Q Will you look through that and get some of the trade papers for that period which would show the market?

A Here's one of November 10.

THE COURT: What year?

THE WITNESS: 1954, Your Honor.

Thereupon, a paper was marked Defendant's Ex-
(tr 395) hibit No. 21 for identification.

MR. SPILLERS: Your Honor, I move the admission of this as an exhibit.

THE COURT: I would think that if your witness could indicate the pertinent portions it might be admissible here for the desired purpose that that portion might be admitted, but I see no reason to burden the clerk's file with a whole newspaper.

MR. SPILLERS: I agree, Your Honor. I would be willing to tear this one part out. I only offered that to

show that it was from this newspaper. That is the only purpose.

MR. MORGAN: We won't object.

Thereupon, two clippings from said exhibit were marked Defendant's Exhibits Nos. 21-A and 21-B for identification.

MR. SPILLERS: I move their admission, Your Honor, into evidence.

THE COURT: What are those, 21-A and B?

MR. SPILLERS: Yes, sir, they are, Your Honor.

THE CLERK: Yes, sir, they are out of the same paper.

THE COURT: Very well.

Thereupon, said clippings were received into evidence as Defendant's Exhibits Nos. 21-A and 21-B.

Q Mr. Franken, I hand you Defendant's Exhibit No. (tr 396) 21-A and No. 21-B, and ask you to examine them and state what they are and what price per ton or per pound is shown for those ads.

A 21-A is an ad put in by Peerless Steel Company of Chicago, Illinois, for some 5/16th plate and half-inch plate at $60.00 a ton, sizes being 72 by 192; 71 by 236, and so forth.

Q You don't need to give those unless the Court would want them. If you are able to, would you break that down to see what that would figure out a pound?

A $60.00 is three cents a pound.

Q And what is the other, 21-B?

A 21-B is an ad put in by Niagara Metal Company for 22 gauge, 36 by 98, and other cold rolled steel at $6.25 per hundredweight.

Q And that's how much a pound?

A That's six and a quarter.

Q And these ads appeared in what paper?

A In the American Metal Market, and that was under the date of November 10, 1954.

Q Do you have any such information concerning the early part or down through the middle of 1955?

A So we won't clutter up the record, if you will let me look through these I'll try to find the one.

(tr 397) Thereupon, the witness handed Mr. Spillers a clipping which was marked Defendant's Exhibit No. 22 for identification.

MR. SPILLERS (Handing clipping to the Court): This was in March of 1955, Your Honor.

THE COURT: Very well, if there is no objection it may be admitted.

Thereupon, said clipping was received into evidence as Defendant's Exhibit No. 22.

Q I hand you Defendant's Exhibit No. 22, and will you say what it is and what time that appeared in the paper.

A It is March 2, 1955.

Q And what is the price quoted there and for what item?

A Fifty tons of 13 gauge hot rolled full coils, 20 inches wide, immediate shipment, $70.00 a ton.

Q And that would be at about what rate per pound?

A That's three and a half cents.

Q I would like to have you tell the time, if you can, when Mr. DeArdo and Mr. Whitehead came to your home after you had been over there in the latter part of August to the plant, and when you had first been told that they had been operating improperly.

(tr 398) A I would say that would be about the middle of September of 1955, or thereabouts; between the middle of September and towards the end of September of 1955.

Q At that time do you know whether or not Mr. DeArdo was still working for Lorentzen?

A He was.

Q You may tell what, if anything, you said or advised either of these men to do.

A In late January or early February of 1956 the attorneys for Sharonsteel contacted and asked me to see if Mr. DeArdo could give them a statement in reference to this steel in my connection. I told them that I would see him. I drove to Weirton on my next trip to Mingo, and I stopped over on the hill—I don't know the name of it, but it's up by the Weirton office about a block from the station, it would be on the left going towards Pittsburgh, and I saw Mr. DeArdo and I asked him if he would give Sharon's attorneys a statement. I said, "All they want is the truth. If you tell the truth nothing can happen, because I have my receipts. You know I did not know it was stolen," which he admitted then that he knew that I

didn't know it up to that time—or not up to August of that year, and so forth. And I talked with him there quite a while. I asked him what he did with all his money I gave him, because I knew it was $20,000.00 or more. (tr 399) He stated he had gambled. I took it that he gambled in a gambling house—I didn't ask how, why or where. I said, "You told me up at the house when you was up there that time with Whitehead that Mr. Lorentzen thought a lot of you,"—he called him the Old Man—"why don't you drive up there and see him and give him the story, tell him what you did with the money, and I think he can help you get it back and they will get their money back." He said he would.

At that meeting I did say to Mr. DeArdo, "There's only one thing that I'm sorry about, that I did not insist that all the receipts that you gave me were not—were like the one that you gave me on January 13, on Lorentzen stationery. That's the only thing I wish, that I had insisted that you give me receipts like that." And that ended the conversation.

I think I saw him one time after that, because Sharon informed me that he wasn't there when they were down there, or he wouldn't see them, or something, I don't know, and I went back and asked him again and he said he would give them a statement. Whether he did or did not, I do not know to this day, because I dropped out of the picture then.

Q Now, about receipts, you have produced receipts here in your testimony this morning. I would like to have (tr 400) you say whether or not you received other receipts.

THE WITNESS: From Mr. DeArdo?

MR. SPILLERS: Yes, sir.

A No, sir. Only what I have given in here.

Q And only one of those receipts, I believe, was dated. Can you explain that?

A No, I can't explain why it was dated. Just happened that way, sir.

Q Can you explain why the others were not dated?

A No, I can't do that, either. I never ever thought of it. Just one of those things. He just gave me a receipt. I never paid any attention to it. It was only when he testified here about dates, and so forth, that I was even concerned and looked at it.

Q With reference to the dealings that you had here, what, if any, report have you made in connection with that, showing what you made or lost, as your profit?

A I think my 1956—or, rather, for 1955 made in 1956 income tax will reflect that I earned from that particular operation somewhere around $2100.00. I'm pretty sure that's what it would reflect.

Q And during the negotiations in this period, from the first time you met Mr. DeArdo up until the time that he came with Mr. Whitehead and informed you of his difficulties and the shortage, did you at any time know (p. 401) or have information to the effect that you were engaging in something that was improper or illegal?

THE WITNESS: Well, so I can answer the question correctly, may she read it again? I didn't catch the first part, sir.

Thereupon, the question was read.

A No, sir.

Q I will ask you whether or not in your lifetime you have heretofore been indicted for a violation of the law.

A No, sir.

Q Do you think of anything in this transaction, or involving this transaction, that you feel would be helpful to the Court and jury in passing on your case?

A The only thing that I can say is, I know that I was never informed or never knew that there had been anything illegal or that this material had been stolen, or anything about it, up until the time that they were at my home, which was in September sometime in 1955.

MR. SPILLERS: You may inquire.

MR. MORGAN: May it please the Court, prior to cross examination of this witness I would like to have a few moments to go over the exhibits that were introduced when he was on the stand, and also to talk to Mr. DeArdo (tr 402) in respect to statements made by this witness to DeArdo as he had just testified to.

MR. SPILLERS: There is no objection on the part of the defense to that, Your Honor. There is something at this time that I should like to ask for. I talked to Mr. Franken for the first time, I think, last Thursday, just a week ago, and he told me about a statement that he had made, and there has been testimony to the effect that Mr. DeArdo gave certain statements. I should like at this time to have the opportunity of seeing those.

THE COURT: We will see about it, Mr. Spillers.

The jury might like to take a few minutes, and you may have the opportunity, Mr. Morgan, to examine the exhibits, and so forth, before you proceed with the cross examination.

MR. MORGAN: Thank you, Your Honor.

THE COURT: As I understand it, you are asking now to see a statement that was given by your client.

MR. SPILLERS: And also by Mr. DeArdo, the statements given by him, since he has testified in the case.

MR. MORGAN: In whose possession are all these?

THE COURT: Very well, we will see about it, Mr. Spillers.

MR. SPILLERS: Thank you.

(tr. 403) Thereupon, the following proceedings were had out of the presence and hearing of the jury:

THE COURT: Now then, may I inquire from counsel if you have any objection to permitting Mr. Spillers to see the statements that he requests?

MR. MORGAN: If I knew exactly what statements he had in mind and I have them, of course he can see them, Your Honor. He didn't say who had them or what statements exactly that he had reference to. I will have to tear apart the file, and I will do that, of course.

MR. SPILLERS: I don't want you to tear any file apart. I don't know, Mr. DeArdo did say, Your Honor, that he gave three statements, I think, and that they were not the same, and since they want to talk to him

THE COURT: I think he said, Mr. Spillers, that he gave a statement to his own attorney—

MR. SPILLERS: Yes, sir.

THE COURT (Continuing): —that he gave a statement to one of these companies, like Lorentzen—

MR. SPILLERS: Yes, sir.

THE COURT (Continuing): —and possibly that he made some statement to the F.B.I.

MR. SPILLERS: That's right, sir. Any that the Government has I should like to see. I think it might be helpful—and it might not be—but here's an accomplice, or one who claims to be an accomplice, who has testified (tr 404) as a Government witness, and, as I understood his statement while he testified, it was to the effect that these statements he had previously given were not all the same. Then I would think it might be material to know wherein they differ.

THE COURT: Well, if you wanted the statements to prove, Mr. Spillers, that the statements were not all the same, and for that purpose alone, he has already admitted that and made his explanation.

MR. SPILLERS: That's right, he has, but I don't know in what particular they were different. I have never seen them.

THE COURT: I believe he made the explanation as to why they were different, and in what particular, as the court recalls his testimony.

MR. SPILLERS: Even if he did, since he has given different statements his explanation might be different, and I would certainly like to see if it was different or if

he explained it correctly. I may be wrong, but I think I have read in cases, Your Honor, that it is proper for me to have that information.

THE COURT: Well, it might be proper if you had some reason to believe that he had made contradictory statements on the outside and that he denied making them, and if you want to use that for the purpose of contradict-
(tr 405) ing him in his testimony, but he has already admitted that he made contradictory statements; in other words, he didn't deny it when he was asked about it.

MR. SPILLERS: Right in that particular, my remembrance is that he said "When I made the first statement I didn't want to involve Whitehead or Fabian." In that particular it's different.

MR. MORGAN: I don't have that statement, I don't believe. Honest.

THE COURT: I wish you would check your file Mr. Morgan, and see what you have.

MR. MORGAN: Are these signed statements you have reference to, Mr. Spillers?

MR. SPILLERS: I don't know whether they are signed or not.

MR. MORGAN: How about the statement of your client?

MR. SPILLERS: He testified he was not asked to sign it, but he tells me that he tried to tell exactly to Mr. Howard, the F.B.I. agent, what he has told me and what he testified to here.

THE COURT: Well, examine your file and see what you have that might be of some interest to Mr. Spillers. The court will be in recess for a few minutes.

Recess.

(tr 406) MR. MORGAN: May it please the Court, in response to the request made by counsel for the defendant as to any statements made by Mr. Franken to Special Agent Howard, I find in our file a report, included within another report of a local agent, of certain statements that were reduced to writing after the interview was conducted, made by Mr. Franken to Special Agent Howard. The only objection I have to furnishing this statement is that I believe it may come too late. I believe under some of the cases he is entitled to it at first. Now his client has already testified. But I have this available, and I object to turning it over. I think it is bad precedent, Your Honor, especially hereafter, unless the motion is properly made and carries all the necessary information that would require any sort of compliance. It appears to be sort of a fishing expedition that is going on now, asking for any statements made by Mr. Franken or by Mr. DeArdo anywhere. For that reason we will object, but I have them available.

THE COURT: What is your purpose, Mr. Spillers, in asking for a statement, or a resume of a statement, made by your defendant to the agent? He has testified that he made the same statement to the agent as he made here from the witness stand. That statement has not been contradicted.

(tr 407) MR. SPILLERS: Very well, if I am wrong in wanting to see that I will withdraw the motion as to that, but before this case went to trial, before a jury was selected, I did make a motion for statements by one of the co-defendants here, Paul Albert DeArdo, and if that is

a bad precedent, or if it's called a fishing expedition—I have no way of knowing what's in there. Apparently the Government does not wish to let me see any such statements made. I would like to merely request that if there are any there and it's improper for me to see them that the Court look at them.

MR. MORGAN: I haven't spoken to his request to see DeArdo's statement. He said that there were several statements. The Government has found one statement that was given, and it is a copy of a signed statement of the Government witness Paul DeArdo, and I have it here, if the Court desires to see it or if the Court orders that the Government furnish it to Mr. Spillers. I contemplate putting Mr. DeArdo back on the stand. I don't recall Mr. Spillers having made a motion for this statement before, except that there was some sort of a request to have any statements made by Whitehead and DeArdo. Of course, that's too general.

THE COURT: At an earlier day of the term, Mr. Spillers, there was a motion made for the production and inspection or the right to copy the signed statements of the defendants Paul Albert DeArdo and James A. White-
(tr 408) head. That motion was at that time refused. However, if the United States Attorney has no objection to your looking it over, I am sure the court has no objection.

MR. SPILLERS: Thank you.

MR. MORGAN: You want Whitehead's also now, Mr. Spillers?

MR. SPILLERS: Are you planning to—

MR. MORGAN (Interrupting): I plan to call him

back, yes, sir.

MR. SPILLERS: Of course I want both of them, then, if they are going to be called back, and that will be, of course, at the time, over my objection, since they have already been here and testified and been cross examined.

THE COURT: Are you ready to have the jury return, gentlemen?

MR. MORGAN: Yes, sir.

Mr. Morgan thereupon handed papers to Mr. Spillers.

—o—

Thereupon, the proceedings were resumed in the presence of the jury, as follows:

CROSS EXAMINATION

BY MR. MORGAN:

Q Mr. Franken, you have testified that you were in-
(tr 409) terviewed by a special agent of the Federal Bureau of Investigation in January of 1956, is that correct?

A Thereabouts.

Q As you remember the date?

A Yes.

Q Where was that interview held, sir?

A He came to my home.

Q About what time of the day or night, do you re-

call?

A I think it was around nine, nine-thirty, quarter to ten, in the evening.

Q In the evening?

A Yes, sir.

Q Do you remember telling Special Agent Howard during that interview whether or not there was a shortage of steel during the period involved in this trial?

A I don't quite understand you, Mr. Morgan.

Q Between November of '54 and August of '55 all these transactions occurred, is that correct?

A That is correct, sir.

Q Did you, in January, 1956, tell Mr. Howard, Special Agent, whether or not there was a shortage of steel during that period?

A I don't know whether I did or not. Maybe in nineteen—when he was there maybe there was a shortage right there.

Q I am not talking about at the time you were talking (tr 410) to him, I am talking about the period we are discussing here, between November of '54 and August of '55.

A If he asked me the question, sir, I answered.

Q What was your answer?

A I wouldn't know that, sir.

Q Did you show the special agent these receipts when you were talking to him, Mr. Franken?

A If I remember correctly, I showed him the Western Union and one or two of the others, but he didn't care to see them all, so he told me.

Q He didn't care to see them all?
A That's right.

Q Do you remember how many of those you showed him, by any chance?
A One or two. I don't know, Mr. Morgan. I know it was late in the evening, and he said that wasn't necessary. I offered to make it detailed.

Q How long was the interview? How long did it take, do you recall?
A Maybe twenty minutes, maybe a half-hour.

Q And it started at nine o'clock.
A I didn't say—I don't know what time he got there. I said it was after nine o'clock.

Q After nine o'clock?
(tr 411) A Yes, sir.

Q But as you recall it you showed him several of the receipts?
A Whatever he asked me I complied with his request.

Q That doesn't answer my question, Mr. Franken, whatever he asked you you complied with his request. Did you or did you not show him any of these receipts when he was there?
A I did show him some. How many, I don't remember.

Q How long after these shipments occurred, as has been testified to by several witnesses and also testified to by you, did you find out how much actual weight to bill your purchaser, do you remember?
A I think I did answer that. The next day or the day after I would call the trucking company and get the weights.

Q Did you ever drop by the trucking company and get those weights, sir?

A Not that I remember. I might have stopped at the trucking company. I've stopped at trucking companies, but I don't remember whether I did on this instance or not, sir.

Q Did you ever sign any of these shipping orders?

A No, sir.

Q If anybody's name appears on any of these shipping orders you didn't put it there, is that what you mean?

A No, sir.

(tr 412) Q I hand you Government's Exhibit No. 8, and ask you if that's your signature under your printed name.

A I don't think it is, sir. It's got an "I" dotted, Mr. Morgan, and my name is spelled "E" and I certainly wouldn't put an "I" over it.

Q I am talking about the signature, not the printing.

A That's what I'm talking about. There's an "I" right there.

Q It appears to be an "I" from the way you look at it, is that correct, Mr. Franken?

A Well, I would say it does.

Q. Did all of these shipments originate at Weirton, West Virginia, sir?

A Yes, sir. Pertaining to this?

MR. MORGAN: Yes.

A Yes, sir.

Q I believe one or two may have been shown to origi-

nate at Youngstown, if I can find it. State what Government Exhibit No. 13 indicates the point of origin of that shipment to be.

A Weirton, West Virginia.

Q On the bill of lading, I meant.

A That says Youngstown, Ohio.

MR. MORGAN: Thank you, sir.

(tr 413) THE WITNESS: What's this? It says Weirton, West Virginia.

Q The bill of lading says "Shipped from Youngstown, Ohio"—

A (Interrupting) But I didn't write that.

Q I didn't say that you did, sir, but it appears that it came from Youngstown.

A That's my first that I have seen it.

Q Will you state whether or not you told Jack Swanson when you first negotiated for the sale of this Weirzin steel coils from Lorentzen that the source was the Lorentzen Manufacturing Company.

A Yes, sir, I mentioned where it came from several times to Mr. Swanson.

Q Do you recall that he testified that you did not?

A I don't know what his direct answer was.

Q You were sitting here in the court room, were you not?

A Yes, I was.

MR. GOODWIN: That is improper, Your Honor, and I will object to it.

MR. MORGAN: This gentleman is on cross examination, Your Honor. I can ask him anything pertaining to the testimony.

(tr 414) THE COURT: He just asked him if he heard the testimony of another witness concerning the same matter.

Q How many times, Mr. Franken, would you judge you visited the Lorentzen plant at Weirton, West Virginia, during this period?

A Oh, between fifteen and twenty, I presume, sir.

Q That would begin, I assume, in September of '54, and on up?

A Late August or early September, sometime.

Q Through August, when this all came out?

A I would presume so, give or take one or two either way.

Q You say you were never in the plant beyond the office?

A That is absolutely right, sir.

Q You were never back in the plant, in the operations?

A No, sir, never.

Q Where did you park when you came by the plant?

A There's a pole there, right as you drive up there. Right alongside of it, right in front of it.

Q Right in front, not on the side?

A Well —

Q It was the long axis of the building? I am familiar with it, it's a big quonset hut.

(tr 415) THE WITNESS: Do you know where the pole is there, sir?

MR. MORGAN: I know where the office is.

THE WITNESS: Well, if you'd drive up to the office diagonally, but my car would be in front of the quonset, never beyond that.

Q Never back where the other trucks were?

A No. The only time I may have gone back there if I went to turn around and there was something in the road.

Q You have often noticed the big trailers parked there by the side?

A There was trailers there, sir.

Q Did you ever see any of them backed in to the side of the plant?

THE WITNESS: To the side of the plant?

Q At the loading gate.

A I don't know. Where I've seen them was in the front usually one or two was standing when they were there.

Q Aside from the shipments concerned and alleged in this indictment, there were other shipments that you made to Sharonsteel from the Lorentzen plant at this time, were there, or were there not?

A You will have to restate that. I don't follow you, sir.

Q Aside from the seven shipments, I believe, involved (tr 416) in the indictment in this case, were there or

were there not other shipments made from the Weirton plant in to Sharonsteel?

A No, not that I know of, sir.

Q You don't remember of any other shipments?

A No, sir.

Q In other words, these include all the steel that you sold to Sharon or to Superior Steel Service that originated at Weirton during the period involved?

A That's right, sir.

Q Do you know Al Green?

A Yes, sir, I do know him.

Q In your conversation with DeArdo at any time did you mention Al Green?

A No, sir. Up until the time of this investigation, and I think it was in January of '56, I didn't hear Al Green's name; in fact, from—I would say I didn't see Al Green through '54 or '55 at any time.

Q Had you known him before that?

A Oh, yes, I had met him when he had a place up at Irondale. He had a fabricating plant, and I used to stop there.

Q You're all in the same business, are you not? You're all brokers, steel brokers?

(tr 417) A Al Green is a warehouse manager.

Q He brokers steel too, does he not?

A If he does, I don't know about it, sir. He might.

Q On this Western Union Exhibit No. 20, when you sent Paul DeArdo $1200.00, who furnished the Western Union office with this telephone number? Did you, sir?

A 880? I'm pretty sure I did. Lorentzen Hardware

phone—I must have, because that's the same people that wrote this here, "Phone Weirton 880."

Q And you sent this from—

A (Interrupting) Chicago.

Q (Continuing)—from Chicago?

A I was at the—you want to know what station?

Q No, I just wondered whereabouts you were.

A Yes, sir.

Q And will you tell why you put the telephone number on there—so that they could call him to come and get the money?

A Well, they ask you when you do that there, or how would they notify him, because I couldn't give them an address there, because I still don't know what you call the road where it's on.

Q But that was furnished so that the Western Union office could call?

(tr 418) A That was at their request, where they might reach Lorentzen Hardware, and so forth.

Q Have you ever paid the Lorentzen Hardware any money for any of these steels?

A Yes, I paid them.

Q I mean through the company books, as far as you know? Have you ever paid them, after all this occurred, any money?

THE WITNESS: You mean after the—

MR. MORGAN: That's right.

A No, sir.

Q I believe you made the general statement that you gave Paul DeArdo about $20,000.00?

A Around twenty, if you will figure it up, it will be.

Q Do you know what the total of all those receipts come to, including the $3,000.00 that is torn loose?

A Sir, I think you will find it's between twenty and twenty-one, or one way or the other a little bit. I did not even total the amount.

Q Going back to these receipts a minute, I notice the month of the year—

A (Interrupting) That is my handwriting, sir, just—

Q When did you put those on, the months of the year?

A Possibly when I was—my income tax—

(tr 419) Q (Interrupting) Indicted?

A No.

Q Excuse me, when your income tax—

A Yes, when I was trying to figure my profit on each item.

Q I noticed on several of them that the word "February" or "March" or something was on them. Did you put that—

A (Interrupting) Yes, just a little bit of a notation, if you'll notice.

Q Is this the usual type of receipt you receive when you pay money?

A I get a lot of them that way.

Q Sir?

A I get a lot of them that way, sir.

Q I believe you stated that you paid Joe Stearn about $15,000.00 in cash, is that right?

A One time I gave him that much. I paid Joe Stearn a lot of money in cash.

Q Is this the kind of receipt you get back, sir?

A I don't think Joe gave me any.

Q And when did you say you received these—immediately after each shipment?

A No, no, I got some of those—I got that when I would see him, when I would make the payment at the time, and as he would send up for a deposit before he (tr 420) would give me the next one that I was missing then for the money I had sent down to him.

Q And I understood you to testify on direct examination that you received all these receipts in the office at Lorentzen at Weirton, is that correct or not?

A Well, he might have come outside and handed me one as I walked out the door. If you are going to be technical with me and say, "Did I get it inside or outside?" that I wouldn't—I would say I got ninety per cent of them inside.

Q I am not trying to be technical, I am just trying to get what the facts are.

A Well, I'm just trying to tell you the truth, sir, without—

Q When you first went to Lorentzen at Weirton, Mr. Franken, did you know what they were manufacturing then?

A No, sir.

Q After you bought your first shipment did you know what they were manufacturing?

A I don't think I did. I don't think I really knew exactly what they were manufacturing; in fact, I know

I didn't know exactly what they were manufacturing until after it was all over, and if you asked me to name one of the parts or describe it I couldn't do it to this very day.

Q Do you recall Mr. Swanson testifying that you did (tr 421) tell him it was from a plant that made venetian blinds?

A Yes, I heard in the meantime that they made venetion blinds as was testified here. I assumed that they made the entire venetian blind, and I hear that they don't, so I can't tell you what component part they make, sir.

Q Do you admit or deny telling Mr. Swanson that they made venetian blinds when you first started selling -

A (Interrupting) No, I don't deny that. They made venetian blinds.

Q But you just said that you didn't know what they made in there.

A When I first sold him I didn't tell him what they made—I don't think he asked me—but in my dealing with Mr. Swanson over the months I did say what they made.

Q Would you mind adding up all these receipts, Mr. Franken? Someone is going to have to do it sooner or later.

MR. SPILLERS: I believe in the envelope that the defendant had I ran a tape at one time here.

THE WITNESS: If you did it isn't there, sir, so I don't know.

MR. MORGAN: Would you mind if he did it now?

MR. SPILLERS: Oh, not at all, no.

THE WITNESS: I get a total of $27,950.00.

Q How much, sir?

(tr 422) A $27,950.00 is my figures.

Q And that includes the $3,000.00?

A Yes.

Q Does it also include the $150.00 that you only got—I think the first load you paid him $1750.00 and you only got credit for $1600.00, according to your testimony.

A No, I didn't put that in, because I gave it to him afterwards.

Q In another receipt somewhere?

A No, he didn't give me a receipt for it.

Q But you paid him $150.00 more then than that shows, didn't you?

A Yes.

Q Then you would add $150.00 to that?

A That's right, $28,800.00.

Q Then you really paid more than twenty thousand, right, Mr. Franken?

A Yes. Well, I said at the time that twenty or twenty-one, I thought, that I gave him.

Q It turns out to be almost $29,000.00?

A According to that there, yes.

Q Those are your receipts, aren't they?

A Yes. I agree there. I say I have never added them up until you gave them to me to total now.

(tr 423) Q You mean you never added them up before?

A I have never, no, sir.

Q How did you figure out your income tax?
A. I gave it to my auditor.

Q Then he's had these receipts?
A Yes, he had them, added them up—I presume he added them, I'm not certain.

Q What is your auditor's name, Mr. Franken?
A Mr. Hoffman.

Q And where is he, in Youngstown?
A Yes, sir.

Q What are his initials?
A To answer that a hundred per cent truthfully—I always call him "Huffie."

Q Is he a certified public accountant, sir?
A That I don't know, sir.

Q He has a telephone, I suppose, sir?
A I would say so, sir. I call him by phone.

Q Then he has a phone, if you called?
A Whether he has an office, now, sir, I don't know. I get him at home a lot.

Q On these receipts that you obtained there at or near the plant at Weirton, you mean you went in there and got these receipts about the time stated and they gave you pages like this instead of the—
(tr 424) A (Interrupting) That's right, whatever he had in front of him.

Q Was this the way you asked for them?
A I didn't ask for them any way. I just asked for a receipt for my money.

Q But none of these that I have seen and noticed carry

any identification that Lorentzen Hardware is connected with it, is that correct?

A I got them right there. They're signed "Plant Manager, LL Company."

Q "LL?"

A There's one on there, "LL."

Q There's one "LL," yes. What does that mean?

A I don't know, until I heard the name here yesterday what it meant. Leveler, I guess, Lorentzen Leveler.

Q I assume that's a trade name of their product?

A Yes.

Q But you did receive one?

A Yes, he gave me that one at the time.

Q And this appears to be one of the first ones you received, from its date, is that correct?

A I think that's the third one, sir.

Q Third?

(tr 425) A I think that's right.

Q And you didn't get any more like these at any time?

A No.

Q And you hadn't added them up?

A No.

Q And you didn't know how much you paid him?

THE WITNESS: Sir?

Q You didn't know how much you had paid him?

A I figured it was over twenty thousand, so I said twenty or twenty-one.

Q It was almost twenty-nine?

A Almost twenty-nine.

Q Was your conclusion that you cleared $2100.00 on these transactions for income tax purposes based on your figures or on your accountant's figures?

A My accountant's. I just looked—glanced at it, and I think that's the figure that was there.

Q Do you have a copy of your income tax with you, sir?

A No, sir.

Q Do you have any records at all that you maintained to show the posting of these figures?

A No.

Q You don't keep any records?

A Not like that, no. I just keep my receipts and stuff like that.

(tr 426) Q The only records you have of steel brokerage transactions are records like this?

A That's right, because most of mine is a commission basis, whereby the people I obtain steel for in most instances pay me a commission, send me a check and a form at the end of the year, for so much money earned—Niagara Metal does, Harmony Tool & Dye does, Northern Illinois does, Truscon Steel does. And by the way, during that period I sold some steel that I got from Truscon Steel at four cents a pound to Jack Swanson, galvanized steel.

Q Where did you get it?

A Truscon Steel.

Q How did you pay for it?

A Cash.

Q Where?

A At Truscon Steel. I paid it to the man who takes care of their surplus steel.

Q That was surplus steel?

A Well, that's what I bought here, the man said it was surplus.

Q What kind of a receipt did you get from—

A (Interrupting) I don't think I asked them for any. If they gave it to me, why, it was—

(tr 427) Q (Interrupting) How would your auditor or your bookkeeper know—

A (Interrupting) I just said Truscon paid me a commission, because I sold it at the same price I got it for over there, and if I added $5.00 to it, then Truscon, when they got paid for it, they sent me a check marked "Commission."

Q In other words, you make profit on steel you never see, is that correct?

A That is correct, sir, in a very lot of instances.

Q I believe that Mr. Gleason said that this morning.

A Yes. And then I get—I don't know what form you call it, but there's a form that they send. I'll get them now in the next day or so for '56.

Q Are you also employed? Are you employed?

A As—

Q Do you have a job?

A No, what I'm doing. That's what I'm saying. I buy for Harmony Tool & Die, I buy for Northern Illinois, I buy for Niagara Metals, I buy for Midwest Materials.

Q In other words, you buy for several firms?

A That is correct.

Q I was given to understand that you were employed by Harmony Tool & Die as their Purchasing Agent. Is that right or wrong?

A I am their Purchasing Agent if you want to call it (tr 428) that, but I work strictly on a commission basis, and I'm down there once a week. The rest of the time I do my other—

Q (Interrupting) You don't get a salary from them, then, in other words?

A No, sir.

Q But the only records you have maintained—you don't keep a book of accounts, general ledger, or anything, as I understand you—

A That's right, sir.

Q (Continuing)—are these receipts?

A That's right.

Q These are the only records you have maintained for all these transactions?

A That's right.

Q I suppose you got something from Sharonsteel Products of Sharon Steel Corporation, didn't you? They sent you a check and you endorsed it? It is here in evidence.

A Yes, sir.

Q Is that a type of check that has a tail on it that you retain?

A Yes, they have a stub on it.

Q Do you keep those?

A Yes, I keep those, whatever type memorandum they have on there.

(tr 429) Q These do not appear to contain any—I'll let you see them—I believe your name appears on the back of each one?

A That's right.

Q According to the testimony of Mr. Jones from Sharonsteel, you received $19,175.00 for all shipments included in those, and according to Mr. Borenstein of Superior Steel Service you received $9,340.88 for all the steel you shipped him, which includes all the steel in this indictment, and that comes to $28,515.00, and here you have given DeArdo $28,800.00. In other words, you gave DeArdo more money than you got, is that right or wrong?

A I don't think so. I hope not.

Q You don't think so, what? Right or wrong?

A I don't think I gave him more than I got, but if I did I did, but I didn't think I did. On this here, you said I received from Sharon nineteen thousand. There's a check that you don't have in there from Sharon for $2,671.35.

Q That would raise what you got from Sharon then, wouldn't it?

A Yes, sir.

Q What was the amount of that?

A $2,671.35.

Q What was the source of that shipment?

(tr 430) A Same place. McCullough Transfer handled it.

Q That was a figure that I did not have in the checks.

A It's in the statement that Sharon gave you.

Q Yes, but that was not included in the indictment, in the figure I read.

A Well, I didn't try and separate it, as I told you.

Q I asked you previously, did you have any other shipments to Sharon from Weirton.

A Well, I didn't even pay any attention to it until just now. I thought they were all in there, sir.

Q But there was that other one?

A Evidently.

Q So, according to our figures—let's see if we are in agreement, Mr. Franken—you received from Sharonsteel Products $21,846.35?

A I figured nine hundred and something. I could be wrong, for I added it fast.

Q But your payment to DeArdo—according to your figures, and that's what I get—is $28,800.00, is that correct?

A Well, and then deduct what I got from Superior Steel. I got nine thousand some dollars from them.

Q Yes. So you made about how much, then, Mr. Franken?

A I thought I made around $2100.00 on it. I am (tr 431) taking that strictly from memory, though, Mr. Morgan.

Q But you didn't keep any records showing these transactions?

A No. My receipts and my shipments.

Q I don't believe you have been shown Government's Exhibit No. 1 that DeArdo had entered. Would you say that they contained the same date?

A Yes, that's right.

Q But you say that DeArdo gave you Defense Ex

hibit No. 1.

A This is the one he gave. This is what he gave.

Q This is what he gave?

A Yes, sir.

Q All right, sir, that's what he gave you—when?

A On January 13, I would say, the date it was made up.

Q Whereabouts, if you remember?

A At Lorentzen. If you notice, there's quite a vast difference between them. He said he wrote them at the same time. If you write something at the same time and copy it, you sure don't make errors in what it says.

Q Maybe he did it on purpose, Mr. Franken.

A Well—

Q Do you know what street Mr. Huffman lives on in Youngstown, Mr. Franken?

(tr 432) A No, sir, I do not.

Q How long has he been doing your work?

A Oh, I'd say possibly seven or eight years up to that time, sir.

Q Is he an accountant?

A Yes, sir.

Q Would he be listed in the phone book under "Accountants," if you know?

A That I do not know, sir.

Q Is he a certified public accountant?

A That I can't answer, sir.

Q But he does have a phone?

A Yes, I have a phone number some place. I call him once a year when I'm ready. I find him some way.

Q But you don't know his first name, except "Huffie?"

A I'm not trying to evade your question. I will try and get it for you. I'm not trying to evade your question one bit. I will try and have it for you this afternoon even, if it's possible—

Q (Interrupting) Thank you, I would be glad to have it.

THE WITNESS (Continuing):—and get some record for you.

MR. MORGAN: That's all.

(tr 433) REDIRECT EXAMINATION

BY MR. SPILLERS:

Q Only one thing, Mr. Franken. I understood you, in answer to my questions about who your contacts were with at Lorentzen, to state, I believe, that you had your dealings all with Mr. Paul Albert DeArdo, the superintendent.

A That's right, with the exception of when I would call. If my shipments were not going out or if they were delayed I would call, and if he wasn't there and the girl said he was out I would ask the girl, I would ask her to relay that message about the shipments.

Q And would you tell her who was calling?

A Oh, yes, sir.

MR. SPILLERS: I believe that's all.

MR. MORGAN: I have no further questions, Your Honor.

MR. SPILLERS: The defense rests, Your Honor.

THE COURT: Does the Government have any rebuttal testimony?

MR. MORGAN: Yes, Your Honor.

Thereupon, the Government introduced the following evidence in rebuttal:

PAUL ALBERT DeARDO, who previously testified, was recalled and further testified as follows:

REDIRECT EXAMINATION

BY MR. MORGAN:

Q State your name, please.
(tr 434) A Paul Albert DeArdo.

Q You are the same Paul Albert DeArdo that testified previously in this case?
A That's right.

Q I hand you herewith Defendant's Exhibits 10 through 20, which purport to be receipts. Since you have previously testified to giving certain receipts, would you identify those to see whether those are the receipts you referred to in your direct testimony?
A Yes, sir, these are some of them.

Q Some of them? Are there more?
A There were more of these pink ones, sir.

Q What did you do with the pink ones?
A Gave them to Mr. Franken.

Q When?

A In February or March of '56.

Q Whereabouts was it that you gave them to him?

A At the gasoline station that I operated on Pennsylvania Avenue in Weirton, West Virginia.

Q At whose request?

A Yes, sir.

Q At his request?

A Yes, sir.

Q How many other receipts had you given him besides those that you have before you?

(tr 435) A I gave Mr. Franken some originally that he had claimed that he had burned up and had destroyed because they weren't exactly suitable.

Q Did he say why they weren't suitable?

A Well, at the time—

Q (Interrupting) When was this, this conversation you were having with Mr. Franken, and where?

A I can't recall exactly where the conversation took place.

Q Give the gist of it, as far as you remember.

A Well, Mr. Franken had given me some receipt blanks to make out some receipts on, which I did, and then he said that it would look better if I made them out on these tablet paper—like, for instance, this little piece right here that's torn in an odd shape.

Q Referring to what exhibit?

A Sixteen.

Q The second receipt in Defense Exhibit 16?

A Yes, sir.

Q Go ahead.

A (Continuing) That it would look better if these receipts were made on different size paper and different odd scraps of paper, and he also wanted a few with the (tr 436) Lorentzen Hardware Manufacturing Corporation letterhead. At that time I made out about six—that's this Exhibit No. 12—and gave those to him.

Q I hand you again herewith Government Exhibit No. 1 and you retain Defense Exhibit 12, and state to the Court and jury whether or not they were made at the same time or at different times, and where they were made, if you know.

A These two were definitely made at the same time because, as I said before, I made approximately six of these which I gave to Mr. Franken, keeping this one for myself, and they were the only ones that were made on the company letterhead paper.

Q Were you employed by the company at that time when you made them?

A No, sir, this—these were made out the first part of '56, in February and March.

Q Why, if there is a reason, were the contents and writing on those two receipts different?

A I believe you will find if you look on the receipts there that they are made out with two different kinds of pens and some in pencil, and he wanted it made to look as if all these weren't made out at the same time on the same days.

Q He wanted them made out so they would not ap- (tr 437) pear to be made at the same time and on the same day or date, is that correct?

A Yes, sir.

Q But those two are dated the same day, are they not?
A Yes, sir.

Q They have different contents, the wording of them is different. Is there any particular reason for that?
A None that I can recall.

Q You just wrote them different?
A Yes, sir.

Q After the disclosure of the steel loss at Lorentzen Hardware, how long was it that you were retained before you were fired?
A Well, I believe the third day that Mr. Shaller was down at the plant I confessed that I had done—had taken the steel, and I stayed there, I believe, one or two days after that.

Q During that time Mr. Franken came to the plant—
A Yes, sir.

Q (Continuing)—is that right or wrong?
A Yes, sir.

Q And did you have a conversation with him?
A It wasn't exactly a conversation. I told him that the company was down taking an inventory, and he took off.

(tr 438) Q Did you later get together?
A Yes, we did.

Q Where?
A At his home in Youngstown.

Q Was anybody with you?
A James Whitehead.

Q There has been testimony here that Whitehead told

him at your suggestion, "him" being Mr. Franken, that you had a good thing, in effect, but it was found out and you apparently were in trouble. Who told Mr. Franken about it, did you or Mr. Whitehead, if you remember?

A Mr. Franken and I did practically all the talking, sir. Mr. Whitehead stayed out—we were in a washroom or laundry room of some type, and Whitehead stayed out in the big part where the TV and lounging chairs and the bar were, but I couldn't tell you whether Whitehead heard any of our conversation or not.

Q You mean he wasn't even in the same room, in the same part of the room?

A Ninety per cent of the time he wasn't.

Q What was the conversation at that time? There has been certain testimony given by the defendant that certain things were said by certain people and responses made. What do you recall happened, without even telling you what he said?

(tr 439) THE WITNESS: Without telling what he said?

Q No, you go ahead and tell the Court and jury what you recall the conversation was.

A Well, I had gone up there to ask Mr. Franken for help. I had gotten a lawyer and he was wanting money, and I had gone up there to ask him for help, because when I confessed to the company I tried to keep everybody out of it and take the blame myself; and I had previously gone to Whitehead and asked him to let me have some money to get a lawyer with and he didn't have it, and I asked him to go up to Youngstown so I could talk to Mr. Franken and ask Mr. Franken for some money, and at

that time, well, he just turned me down more or less cold, and I told him at the time that he was as responsible as I was and that he knew that the material was hot, and that I figured that he was just as responsible as I was, and he told me, well, that, as far as that was concerned, whenever this came up, why, if anything was said, why, he'd just say that he didn't know anything about it.

Q But you didn't tell him or agree with him that he didn't know anything about it at that time, as I take your testimony now?

A I didn't catch you.

Q You didn't tell him at that time and agree with him that he didn't know anything about the steel being stolen theretofore?

(tr 440) A Definitely not.

Q Do you know whether Whitehead overheard any of this conversation?

A I couldn't say, because, like I say, ninety per cent of the time Whitehead was in the main part of the basement.

Q What was he doing, do you know?

A I do know that he had some drinks. As to how many, I don't know. I know Mr. Franken told him to make himself at home and to go ahead and mix him a drink.

Q At that time had you already told Mr. Shaller about this?

A Yes, sir.

Q How long before this had you told Mr. Shaller about the loss and whose responsibility it was?

A Nine or ten days previous to this.

Q And you say you took the blame?
A Yes, sir.

Q And then you went to see Mr. Franken to get help?
A Yes, sir.

Q You meant financial help, Paul?
A Yes, sir.

MR. SPILLERS: If Your Honor please, I will have to object. He has been over this twice already, the very (tr 441) same testimony. I submit that he shouldn't go over it again.

THE COURT: Yes, there is no necessity for repeating.

MR. MORGAN: I want to continue along for just a few more questions. I don't think these will be repetitious.

Q Did Fred Franken, on the occasion of your visit at his home with Whitehead at the time we are discussing, advise you to go tell the "Old Man," meaning Mr. Lorentzen, I assume, the whole story?
A Not that I recall.

Q Well, did he or didn't he, if you know?
A I don't believe he did, because it would be pretty silly—I had already confessed, and Mr. Shaller, the day I confessed, called Mr. Lorentzen and talked to him on the phone in New York City and told him that they had found out who in the plant was responsible for the shortage and discussed with him about what to do, whereupon I went with Mr. Shaller to a lawyer and made a statement to the effect that I was the man in the plant responsible.

MR. MORGAN: I believe you testified as to that in your first examination, so we won't have that repeated. That's all.

RECROSS EXAMINATION

BY MR. SPILLERS:

Q Mr. DeArdo, you testified about these receipts yesterday, didn't you?
(tr 442) A I did, sir.

Q And I believe you said all of the receipts were dated, didn't you?
A There were some dated, yes, sir.

Q Didn't you say in answer to my question that they were all dated?
A I don't recall whether I did or not, sir.

Q Well, is your remembrance about your answer on that just as clear as the testimony you have given here now?
A I don't know, sir.

Q You don't know whether what you said yesterday and you're not sure whether you told me yesterday they were all dated?
A No, I don't.

Q And you just testified about that yesterday?
A Yes, sir.

Q Were all the receipts dated, or weren't they?
A No, they weren't.

Q And you don't know that you said yesterday in answer to my question that you had a date on all of them?

A I can't honestly say that I did.

Q Did you tell this Court yesterday and this jury yesterday anything about this defendant saying that he had burned some receipts?

(tr 443) A No, I didn't, sir.

Q Why didn't you?

A Because at the time I hadn't recalled it, sir.

Q Also, did you tell them anything yesterday about him giving you forms of receipts and asking you to make out receipts on that?

A I believe I did mention something about him giving me some receipts out of a receipt book.

Q And did you say anything about him telling you that he would prefer to have them written out on odd sheets of paper?

A I don't believe so, sir.

Q And didn't you make a statement yesterday on that witness stand that at no time did you ever tell this defendant or say to him that this was hot steel?

A Now that I don't know, sir.

Q You don't remember whether you used that term or not?

A No, I don't.

Q And is there anything else that you can tell us now about the transaction that you had with the defendant here, Fred Franken, that you didn't tell yesterday.

A I recall one other thing.

(tr 444) Q All right.

THE WITNESS: You mean about this transaction

on the receipts, or the whole thing?

MR. SPILLERS: The whole thing.

A I recall that there was one payment that was made at the Blue Danube in Toronto, Ohio, that I hadn't recalled before.

Q And how much was that?

A I believe that was around $1500.00, sir.

Q And I believe you stated yesterday that you received payments from $1500.00 to $2500.00, the payments would be.

A Somewhere around there, yes, sir.

Q And you also stated that you received a telegram money order payment for $1300.68, or something like that.

A I believe I said approximately $1300.00, sir.

Q And besides thirteen didn't you have some other dollars in there?

A I don't recall whether I did or not, sir. At the time I believe I said I didn't exactly recall the exact amount, and I didn't.

Q Do you recall it now?

A No, I don't.

Q But you know it is thirteen hundred and some odd dollars?

(tr 445) A I believe it's around $1300.00.

Q Yesterday on your examination on this very matter, you were asked, "Where did you give these receipts?" and you answered, "He came to the gas station that I was operating and picked up some receipts, and the balance I.

gave him at his home in Youngstown," is that correct?

A Yes, sir.

Q You didn't say anything about getting any receipts to him in Youngstown today, did you?

A No, sir.

Q And you were asked, "What did these receipts show?" Did you answer, "They showed that I had received so much money on such and such a date for steel sold to Mr. Franken"?

A Yes, sir, that's what I answered.

Q And now do you want to say that these receipts have dates on them?

A No, I don't.

Q Well, do they?

THE WITNESS: Do they?

MR. SPILLERS: Yes.

A No, they don't. One does.

Q Do you want the Court and jury now to understand that these two receipts—that is, the one that you brought out and introduced yesterday, being Government's Ex- (tr 446) hibit No. 1, and Defendant's Exhibit No. 12—both of them bearing the date of January 13, 1955, were written by you at the same time?

A Yes, sir.

Q And what does the one you now have say?

A "Received of Fred Franken $2500.00 for steel coils sold."

Q And who signed that?

A Paul DeArdo.

Q And is there anything under your signature?

A No, sir.

Q And how is "Received" spelled there?

A R-e-c-e-i-v-e-d.

Q I hand you No. 12 and ask you if you wrote that one.

A Yes, sir.

Q At the same time?

A Yes, sir.

Q And what does that say?

A "Received of Fred Franken $2500.00 payment in full for Weirzin coils. Paul DeArdo, Superintendent."

Q Why did you make those different if you wrote them at the same time?

A I don't recall, sir.

Q But you do now want the Court and jury to believe (tr 447) that you remember now better than you remembered yesterday?

A In some respects, yes, sir.

Q And why is that?

A Well, I think it's because of the fact that as the case goes along you have more time to think about it.

Q Yet you couldn't remember that you made this answer about the dates yesterday?

A No, I didn't recall it, no, sir.

MR. SPILLERS: That's all.

MR. MORGAN: No further questions, Your Honor.

—o—

JAMES A. WHITEHEAD, who previously testified, was recalled and further testified as follows:

REDIRECT EXAMINATION

BY MR. MORGAN:

Q State your name.
A James A. Whitehead.

Q Are you the same James A. Whitehead that testified yesterday?
A I am.

Q There has been some testimony as to a conversation that occurred in the home of the defendant, Fred Franken, in Youngstown, when you and Paul DeArdo and Fred Franken were present. Do you remember that incident? (tr 448) A Yes, I do.

Q Do you remember hearing any conversation between Paul DeArdo and Fred Franken?
A Partially.

Q Sir?
A Partially.

Q Do you remember hearing Fred Franken say to Paul DeArdo that, "I didn't know that the steel was stolen" or that "You knew that I didn't know the steel was stolen," or something to that effect?
A He stated that he didn't know that the steel was stolen, and Paul had told him, "Why, you knew it was, I mentioned it before."

Q And that was the extent of that?
A That's right.

Q What were you doing? Were you outside, or right

in the same room, or what?

A I was going back and forth from room to room. I was drinking in the other room.

Q Drinking liquor?

A Whiskey.

MR. MORGAN: No further questions, Your Honor.

MR. SPILLERS: No questions.

(tr 455) * * *

Thereupon, the Court charged the jury as follows:

Gentlemen of the jury, I want to congratulate you on your quiet patience and earnest attention during the presentation of the evidence in this case. Perhaps some portions of the testimony have appeared to you to be rather dry and uninteresting, yet I have observed that you have never ceased to be attentive.

(tr 456) The office of the jury is an ancient, honorable and highly important one. To the jury is committed the sole and final judgment of the facts of the case. This is no idle fiction of law and I desire to emphasize the point that you, gentlemen, are the sole judges of the facts, and while I have not and shall not intentionally intimate any opinion whatever upon any disputed fact in this case, yet if I should inadvertently do so, I desire that it shall not influence your action in the slightest degree. You are sworn to well and truly try the issue in this case and a true verdict render according to the law and the evidence, and the tenor of the oath which you have taken indicates the frame of mind in which you should dis-

charge your duties. No prior impressions should, for one moment, have a place in your minds but, as citizens of the United States discharging a most solemn duty of citizenship, sworn to render a true verdict, you should calmly, dispassionately, and without any bias or prejudice, examine and weigh the evidence in this case in the light of the instructions given you as the law in this charge and then, after honest thought, render your verdict.

This case comes before you by reason of an indictment returned by a grand jury against this defendant and two others named therein. The fact that an indictment was returned against this defendant, Fred Franken, does not (tr 457) raise any presumption of guilt against him and is not in any way to be considered as evidence against him. The indictment was returned based upon the testimony of witnesses who were called before the grand jury, out of the presence of the defendant and without any opportunity to him or his counsel to cross examine the witnesses. The defendant has entered his plea of not guilty to the indictment and, by such plea, he has put in question and at issue every material part and element of the indictment and the charges contained therein, and the burden of proof is on the government.

If you should find the defendant not guilty, then it is the duty of the Court to discharge and dismiss him; but if you should find the defendant guilty, it is the duty of the court to determine and pass sentence upon the defendant as the law provides. You are cautioned that you should not concern yourselves with any sentence that might be imposed in the event you are convinced beyond a reasonable doubt of the guilt of this defendant, since the determination of the sentence and the terms thereof is a

responsibility which is imposed upon the court alone and a matter beyond the scope of your duties.

The charge contained in the indictment, upon which this defendant is brought to trial, is commonly known as a charge of conspiracy to commit certain offenses against the United States. The law makes it an offense against
(tr 458) the United States for any one to unlawfully transport, and cause to be transported, in interstate commerce, goods, wares and merchandise of the value of $5,000.00 and more, knowing the same to have been stolen. It is also an offense against the United States for any one to sell and dispose of, and to cause to be sold and disposed of, goods, wares and merchandise of the value of $5,000.00 and more, transported in and constituting interstate commerce, knowing the goods, wares and merchandise to have been stolen.

Another section of our federal statutes pertains to conspiracy to commit an offense against the United States and provides, in substance, that if two or more persons conspire, combine, confederate, arrange and agree together to commit any offense against the United States, and if any one or more of such persons do any act to effect the object of the conspiracy, each person is guilty of an offense. This indictment charges this defendant, together with Paul Albert DeArdo and James A. Whitehead, with conspiring to unlawfully transport, and cause to be transported, in interstate commerce, certain prime steel in mill width coils of the value of $5,000.00 and more, being the property of the Lorentzen Hardware Manufacturing Corporation, at Weirton, West Virginia, such steel having been theretofore stolen and taken by fraud with in-
(tr 459) tent to steal the same, the said defendants, and

each of them, well knowing said steel to have been stolen.

The indictment further charges that the same parties did conspire to sell and dispose of, and cause to be sold and disposed of, said steel, the same having been theretofore the property of and stolen from the Lorentzen Hardware Manufacturing Corporation, at Weirton, West Virginia, and transported in and constituting interstate commerce, the said defendants, and each of them, then and there well knowing said steel to have been stolen, and thereafter transported in and constituting interstate commerce. The indictment also contains a statement of fourteen overt acts, naming in each one the defendants in the indictment who are said to have committed the acts, and the indictment charges that all of these acts were committed by the defendants named in the indictment, and each of them, in furtherance of the alleged unlawful conspiracy, confederacy, combination and agreement and for the purpose of effecting the objects of said conspiracy.

Before proceeding to instruct you particularly as to various phases of the case, I desire to call to your attention certain general and fundamental rules of law which are applicable to all cases where an individual is on trial for the commission of a criminal offense.

(tr 460) Under the law of our land, every person accused of crime is presumed to be innocent, and this presumption of innocence accompanies and abides with the defendant throughout the trial and until it is overcome by evidence which satisfies your minds of the truth of the charges against him beyond a reasonable doubt. This presumption of innocence can be overcome only by evidence which is presented before you and, in order to overcome

this presumption, the evidence must be clear and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty as charged.

The burden of proof is on the government to satisfy your minds by legal and competent evidence, beyond a reasonable doubt, of the guilt of the defendant, Fred Franken, upon the offense charged against him in this indictment. Reasonable doubt means just what the words themselves imply—a doubt founded on reason and which must arise from the evidence; not a mere possible, captious or mere fanciful doubt. It is not such a doubt as may be merely conjured up in the mind of one who dislikes to accept the responsibility of convicting a fellow man, and it is not a doubt that may be engendered by pity or sympathy for the unfortunate position of the defendant, since your decision must be based upon the evidence and (tr 461) cannot be influenced, in any degree, by pity or sympathy. A reasonable doubt is an actual doubt of which you are conscious after going over in your minds the entire case and after giving consideration to all the evidence and every part thereof. If you then feel uncertain and are not fully convinced that the defendant is guilty, and if you believe that a reasonable man, in any matter of like importance, would hesitate to act because of such a doubt as you are conscious of having, that would be a reasonable doubt of which the defendant is entitled to have the benefit and you should find him not guilty. But if, after a fair and impartial consideration of all the facts and circumstances in the case as shown by the evidence, you have an abiding conviction of the guilt of the defendant to a moral certainty, of course you could then have no reasonable doubt as to his guilt and it would be your duty to find him guilty.

The law recognizes two types or classes of evidence—the one direct and positive, the other circumstantial. Crimes are not ordinarily committed in the open. They are sought to be concealed or covered up and, therefore, the law wisely determines that society shall not be at the mercy of criminals who conceal their purpose in perpetrating their crimes or in attempting their criminal acts. Circumstantial evidence is well recognized in the law (tr 462) and convictions can be based, and in many cases must necessarily be based, upon purely circumstantial evidence. In this case, the evidence is both direct and circumstantial. When the prosecution relies upon circumstantial evidence, whether wholly or partially, the circumstances presented must refute any reasonable presumption of innocence. The circumstances, if relied upon by the prosecution, must be taken link by link and form such a chain as to bring conviction to the minds of the jurors beyond a reasonable doubt. Here, after considering all the evidence, both direct and circumstantial, if you are satisfied beyond all reasonable doubt that the defendant is guilty of the offense with which he is charged in this indictment, then it is your duty to render your verdict accordingly.

As you have been told, you are the sole judges of the facts and, in determining the facts, you must of necessity depend a great deal upon the testimony of the witnesses who have appeared before you. Therefore, the law has made you also the judges of the credibility of every witness and the weight to be attached to the evidence given by every witness. In considering the testimony of a witness, you may consider, among other things, his or her demeanor on the witness stand; the way in which he or she testified; his or her possible interest, if any, in the

subject matter or the outcome of the trial; his or her (tr 463) apparent candor and fairness, or lack thereof; the consistency or inconsistency of his or her statements; his or her intelligence, or lack thereof; his or her opportunity of knowing the facts; his or her bias or prejudice, if any such is apparent; whether or not his or her testimony is supported or contradicted by other witnesses; the reasonableness or unreasonableness of the story told by the witness; and, finally, all the facts and circumstances which may reasonably aid you in judging the truth or falsity of the testimony of the witnesses. These rules apply to the testimony of the defendant as well as to the testimony of every other witness, because his testimony is governed by the same considerations, and you may weigh it as you would weigh the testimony of any other witness since you are the sole judges of his credibility and the weight to be attached to his testimony, just as you are the sole judges of the credibility of every other witness and the weight to be attached to his or her testimony.

In this connection, the court instructs you that Paul Albert DeArdo and James A. Whitehead, who are named as defendants with Fred Franken in the indictment in this case, have entered pleas of guilty to the charge of conspiracy as contained in the indictment. This is shown by their own testimony on cross examination in answer to questions propounded to them by defense counsel. You (tr 464) should receive their testimony with caution and you may take into consideration, in judging their credibility and the weight to be given to their testimony, the fact that they stand convicted by their own pleas of guilty of the offense charged in the indictment in this case.

As in many cases, the witnesses may not all here agree

as to the facts in question. In considering conflicting statements of different witnesses, it is your duty to reconcile them insofar as that may reasonably be done. You do not have the right to reject, arbitrarily and without reason, any part of the testimony. But in considering the testimony of all the witnesses, including DeArdo, Whitehead and the defendant himself, if you believe that any person testifying in this case has knowingly testified falsely as to any material fact, you may believe such parts of the testimony of that witness as you believe to be true and reject such parts as you believe to be false, or you may reject the testimony of that witness in its entirety, for it is a matter for you to determine, from all the testimony taken and all the circumstances surrounding the case, which witnesses have testified truthfully and which ones, if any, have testified falsely.

In considering the evidence before you, your attention is directed to the fact that not all matters, even matters (tr 465) properly coming to your attention in this trial, can be considered by you as evidence. For example, the indictment itself, the opening statements of counsel, the arguments of counsel, the remarks of counsel during the course of the trial and any remarks of the court during the trial, are not evidence and they are not to be considered by you as such in determining the facts of the case. This applies also to any evidence or statements which may have been ordered stricken out or which you may have been instructed to disregard. The opening statements of counsel are intended to give you a brief outline of what each side expects to prove by proper evidence to be later introduced. Closing arguments of counsel are often very helpful in recalling to your minds the testimony of the various witnesses as they have appeared before you, but

these arguments are not evidence. The exhibits which have been introduced and admitted in evidence are a part of it and you are to consider them in the same manner as other evidence in the case. In addition, you are entitled to consider the circumstances of the case and circumstances surrounding the case as disclosed by the evidence. Such circumstances may aid you in determining the ultimate issue which is, of course, the guilt or innocence of the defendant.

It becomes important now for the court to define a (tr 466) conspiracy as that word must be defined and understood by you in reaching a decision in this case. A conspiracy, as applied to the charge in this case, is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose. A conspiracy is constituted by an agreement; it is, however, the result of the agreement and not the agreement itself. No formal agreement between the parties is essential for the formation of a conspiracy; it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient for two or more persons, in any manner, or through any contrivance, passively or tacitly, to come to a mutual understanding to accomplish the combination and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, such persons become consp ators. In this case, it is enough if, as the result of

separate negotiations, at the same or different times and places, an arrangement was made such as charged in the
(tr 467) indictment, and some act in furtherance of such arrangement, as specified in any of the overt acts contained in the indictment, was done by one of the parties to such an arrangement.

Persons combining for the execution of a crime do not ordinarily expose themselves to public observation, and the fact of combination can, therefore, sometimes be established only by proof of the acts of the several parties in such combination, the relation of those acts to each other, and their tendency, by united effect, to produce the common result. If the jury should find, beyond all reasonable doubt, that the acts of the parties charged in this indictment with conspiracy were related to each other, and were for the consummation of the criminal purpose charged in the indictment as the object of the conspiracy, you are at liberty to find that the various parties performing the several and respective acts were engaged in a conspiracy to commit the offense, although there may be no direct evidence whatever before you to show that such parties ever entered into any formal agreement to commit such offense.

This defendant is not on trial for stealing the coils of steel from Lorentzen Hardware Manufacturing Corporation, nor is he charged with the substantive offense of transporting this steel in interstate commerce knowing the same to have been stolen, or selling or disposing of
(tr 468) this steel after it had been transported in and constituting interstate commerce. The gist of the offense here is the unlawful conspiracy, combination, confederation, arrangement and agreement to violate these laws

with respect to transporting in interstate commerce this steel of the value of $5,000.00 and more, knowing the same to have been stolen, and selling and disposing of said steel of the value of $5,000.00 and more, or causing the same to be sold and disposed of after the same had been transported in interstate commerce and constituting interstate commerce, knowing the same to have been stolen.

If you believe from the evidence in this case that the defendant, Fred Franken, believed that he was purchasing steel from Lorentzen Hardware Manufacturing Corporation, at Weirton, West Virginia, the owner of the steel coils, that he did not know they were stolen, and if he then transported this steel, or caused the same to be transported in interstate commerce, and if he sold the goods after they had been transported in interstate commerce, or caused the same to be sold and disposed of, without the knowledge that the steel was stolen, then you could not find him guilty of the offense charged against him, but must acquit him.

However, on the other hand, if you believe beyond a (tr 469) reasonable doubt that the defendant, Fred Franken, knew that he was acquiring these coils of steel from Paul Albert DeArdo individually, that the steel was the property of Lorentzen Hardware Manufacturing Corporation, that Paul Albert DeArdo was not the owner thereof and had no right to sell the same; and if you further believe that defendant Franken negotiated to purchase this steel from Paul Albert DeArdo from time to time and over a period of time under some arrangement, agreement or understanding that he, Fred Franken, would ship or transport, or cause to be transported, said steel in interstate commerce from Weirton, West Virginia, to

a point in another state as charged in the indictment, and that he would sell this steel after it had been so transported, and would divide the proceeds of sale with either or both of the other defendants named in the indictment, namely, Paul Albert DeArdo and James A. Whitehead, and if you further believe beyond a reasonable doubt that he did so ship or transport said steel, or cause the same to be transported, and that the steel was of the value of $5,000.00 and more, then you should find the defendant, Fred Franken, guilty of the charge of conspiracy as contained in this indictment.

In determining whether or not the steel was of the value of $5,000.00 and more, the true standard of value to be applied is the fair market value at the time and (tr 470) place of taking, if the steel had a market value at such time and place. If you believe beyond a reasonable doubt that the various shipments of steel, concerning which you have heard testimony, were not separate and independent transactions but were made pursuant to a conspiracy between or among the defendant, Fred Franken, and one or both of the other defendants named in the indictment, then you could consider the fair market value of all of the various shipments of steel, so that the law would be violated if the total of the fair market value of all such shipments was as much as $5,000.00 or more, and the law would be violated even though no one such shipment was of the fair market value of as much as $5,000.00.

As you have been told, the burden is placed upon the government to establish in your minds, beyond a reasonable doubt, every fact essential to the conviction of this defendant and that the defendant is guilty in manner and

form as charged in the indictment. If you believe that the conduct of the defendant, Fred Franken, as disclosed to you by the evidence in this case, was such that two inferences might fairly and reasonably be drawn, one of which is consistent, and the other of which is inconsistent, with innocence, you cannot adopt the inference unfavorable to the defendant and convict him, but you must adopt (tr 471) the inference consistent with his innocence and find him not guilty. You are instructed that in no criminal case can a jury find a defendant guilty on mere suspicion, guess or speculation.

The issues in this case for your determination would not appear to be too complicated. Sometimes the court feels bound to go over the evidence in detail to be sure that your attention has been called to every phase of it, but I feel that there is no occasion or reason in this case for doing so, as counsel have carefully, thoroughly and ably gone over the evidence with you in their closing arguments. Your attention has been directed to circumstances and to points of view which may or may not have occurred to you. Every claim, one way or the other, that could fairly be made upon the evidence has been made. I am sure that the arguments of counsel have been helpful to you in refreshing your recollection as to the evidence.

Gentlemen, your verdict should be unanimous—that is, you must all agree. I give you this case for your decision. I know that you will calmly, dispassionately, without bias, without fear and without favor, apply the law to the evidence and so reach your verdict. Use your good sense and your conscience, bearing in mind the high purpose for which this court is established—the purpose of doing justice according to law.

(tr 472) The Clerk has prepared and will hand you appropriate forms of verdict for your use in returning your finding into court. The Marshal will now show you to your jury room, but do not begin your deliberations until the court sends word to you by the Marshal that it is proper for you to do so, and before you retire, the two alternate jurors selected in this case may be excused, and I am happy that they may be excused because that means that the other twelve are all in good health and are here and are ready to discharge their duties.

JOHN T. FEY, Clerk

APPENDIX OF APPELLEE

In the

United States Court of Appeals

for the Fourth Circuit

No. 7452

FRED FRANKEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Albert M. Morgan,
United States Attorney,
202 Post Office Building,
Fairmont, West Virginia

JUSTICE-FELTZ PRINTERY, FAIRMONT, W. VA.

In the

United States Court of Appeals

for the Fourth Circuit

No. 7452

FRED FRANKEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee

APPENDIX OF APPELLEE

Excerpts From Transcript of Proceedings
at Wheeling

• • • •

PROCEEDINGS
Monday, January 7, 1957

• • • •

(tr 2) * MR. MORGAN: I understand there is another defendant in the court room for arraignment this morning, Mr. Fred Franken.

---

* NOTE: "(tr --)" set flush left refers to pages of reporters transcript.

Thereupon, the defendant presented himself at the bar of the court.

THE COURT: Do you have counsel, Mr. Franken?

THE DEFENDANT: I am in the process of negotiating with counsel now, Your Honor.

THE COURT: You haven't employed counsel yet?

THE DEFENDANT: No, sir, not—I had an attorney from Youngstown with me but he cannot practice in the United States Court, so I have been in telephone conversation to have a meeting after my arraignment.

THE COURT: Have you been furnished with a copy of this indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Have you seen it?

THE DEFENDANT: Yes, sir.

THE COURT: You are fully familiar with the nature of the charge against you?

THE DEFENDANT: Yes, sir.

THE COURT: You say you are in the process of negotiating the employment of counsel?

THE DEFENDANT: Yes, here in Wheeling.

(tr 3) THE COURT: The court had in mind this morning arraigning you and asking you to enter a plea to this charge, although the court does

not want to do that if you feel you need the advice of counsel before entering your plea.

THE DEFENDANT: Their advice was to plead not guilty and come and see them then.

THE COURT: Then you are prepared to plead to the indictment this morning in the absence of counsel?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You understand, Mr. Franken, that you and two other defendants, Paul Albert DeArdo and James A. Whitehead, are charged with a conspiracy?

THE DEFENDANT: Yes, sir.

THE COURT: And what is your plea to that charge, guilty or not guilty?

THE DEFENDANT: Not guilty.

THE COURT: Plea of not guilty. Is this defendant under bond?

MR. MORGAN: Yes, I believe he is.

THE COURT: Is it a continuing bond in this court?

THE CLERK: Yes, sir.

THE COURT: Very well, Mr. Franken. I would suggest that you communicate or keep in touch with the United States Attorney, because in these cases where there are pleas of
(tr 4) not guilty entered we are going to prepare for trial very shortly.

THE DEFENDANT: Yes, sir.

• • • •

PROCEEDINGS

MONDAY, JANUARY 21, 1957

* * * *

(tr 6) MR. SPILLERS (Continuing): — which took most of that week. I didn't get to see Mr. Green after that. Mr. Charles McCamic died on Sunday, two weeks ago, and on Monday morning I received a call from Mr. Wesley Tinker, of the firm of McCamic & Clarke — we were making arrangements for the Bar to meet in accordance with the custom of the Ohio County Bar — and he advised me that he had been approached by Mr. Franken, and said that because of a good many things he (tr 7) could not represent him and asked if I would do so, or my firm, and I told him we would do what we could to help out.

We got in touch with Mr. Franken and he came to our office on Thursday of this last week. Mr. Russell Goodwin went in and started studying this indictment, and it's a rather complicated indictment, Your Honor — there are, I believe, nine overt acts alleged in a conspiracy indictment — and we immediately filed a motion for a bill of particulars, but when there was indication from the United States Attorney's office that it was the plan of the Court to have this case tried today we saw we couldn't get ready for it. We worked on Saturday and Saturday afternoon and part of yesterday.

* * * *

(tr 8) THE COURT: You my file the motions but the Court will not hold out much hope to you that the case will be continued. I want you to understand the Court's position, Mr. Spillers. Mr. Tinker called me by telephone when I was in my office at Parkersburg. He told me at that time that his firm had been approached by Mr. Franken as to representation of Franken in this case; that they had told him that they would make an investigation and would then advise him as to whether or not they would represent him at all. That, as I understand it, was done on the day that Mr. Franken was arraigned in this court. However, the indictment in this case was returned on December 12 and Mr. Franken had knowledge of that indictment shortly thereafter, so I am advised.

Mr. Tinker said that it would be impossible for him to even complete his investigation of the case by today, which was the day that had been indicated for trial, and I told him

(tr 9) at that time that I thought under the circumstances this defendant had been very lax in his efforts to secure counsel; that, so far as I was concerned, the case would not be continued, and he said, "Then, under the circumstances, we cannot represent this defendant because we cannot make our investigation by that time." Now, what position does that leave the court in if I tell one counsel that and then other counsel should come in and say "We want to continue the case because we haven't made an investigation?"

MR. SPILLERS: I say, Your Honor, that that is not the only ground that we are urging, and I must say in Mr. Tinker's behalf that just what the Court has stated here Mr. Tinker advised me of that, with the further addition that it was his opinion that Your Honor had misunderstood this man in one particular — I understood him to say that he understood from you that Mr. Franken stated that he had counsel. He did appear in Fairmont with the man from his city, Youngstown, Ohio, who has been his counsel in civil matters over the years, on an early day in January; but this is a man who is not familiar with criminal procedure, and at that time he had stated that he could not represent him, that he would have to get someone else, and since then Mr. Franken has been trying to get counsel.

• • • •

(tr 10) THE COURT: When Mr. Franken appeared here for arraignment he stated that he had consulted with counsel and that counsel had advised him to appear here and enter a plea of not guilty.

MR. SPILLERS: I think that's right.

THE COURT: Very well, he evidently had counsel at that time.

MR. SPILLERS: I don't believe that Mr. McCamic and Mr. Tinker ever did take his assignment, but they did do some investigation and they have turned that over to me — or to Mr. Goodwin. We have had the benefit of that, and it's quite considerable.

THE COURT: You may proceed, Mr. Spillers, with presenting any motions you want to make.

• • • •

(tr 11) MR. SPILLERS: On the matter for continuance, Your Honor, when the plea of not guilty was entered here on the 7th day of January, that was after the defendant had talked to Mr. Tinker and it was on Mr. Tinker's advice to do that,

(tr 12) but with the clear understanding that Mr. Tinker and his partner had not accepted the responsibility of being defense counsel, and that was before we learned anything about the case. I can understand that since this indictment did come out in the middle of December, this is over a month later, that the Court would feel that this resident of Youngstown, Ohio, has not used proper diligence. On the other hand, Your Honor, it is a complicated case, to us, at least—a conspiracy indictment, it has nine overt acts alleged, it takes time to prepare for this. It is a felony indictment where his liberty is at stake, and on his behalf I should like very much to have more time to prepare for this, if the Court can grant it, because I had never met him, never knew a thing about the case myself until on Thursday of last week. I hope that, in order to properly prepare and see that he has proper defense to this serious charge, additional time can be granted. I have not worked on it as hard as Russell B. Goodwin has, but we have spent a good many hours on it. We tried to reach some essential witnesses yesterday morning at Steubenville, Ohio, and I went up there on Saturday night to talk to one, so I hope

the Court will consider that this is not a case where we have sat idly by, realizing that there was a thought in the mind of the Court that it would go to trial this morning.

(tr 13) THE COURT: The fact is, Mr. Spillers, that the court indicated to counsel for the Government that it was the court's desire to set these cases for trial a week earlier than today, last Monday—

MR. SPILLERS: Yes, sir.

THE COURT (Continuing):—and the United States Attorney assured me that he thought it would be only fair to give these defendants further opportunity to prepare for trial, and asked that the matters go over until today. Then when the court was advised that motions were to be filed, the court instructed the clerk not to call the jury back until tomorrow. Now, I do not have any doubt in my mind that you have been as diligent as you could be, under the circumstances. However, it was probably reported to you the conversation that Mr. Tinker had with the court—

MR. SPILLERS: Yes, sir.

THE COURT:—that the court was unwilling to continue the case for the purposes of further investigation because the court felt that this defendant had been anything but diligent in undertaking to secure counsel and get this case ready for trial, since it has been over a month since this indictment was returned—about a month and a week—so the court is not kindly disposed toward

the motion to grant a continuance. In other words, if these defendants, by

(tr 14) sitting idly by and doing nothing in connection with the preparation of the defense of their cases, can run the affairs of this court then I think we had better close the court, and the court is not disposed to do that

MR. SPILLERS: Well, of course,I am an officer of this court and will have to do whatever the Court decides. There are a number of people essential here. One of them is a Mr. Johnson, who formerly worked for the Follansbee Steel Company at Follansbee. I have been unable to get him. He is essential to the proper defense of this. I think, from what I have learned, just from examining the records here, that the Government worked on this case over a year to get it ready to present to the Grand Jury—a matter of a conspiracy indictment with two other people in here, and I have been advised that one or two of these co-defendants have already entered pleas of guilty in this case. I have not talked to them—maybe they wouldn't talk to me. But here is a man who has lived all of his life without ever being in court before—no record except that of a law-abiding citizen—faced with something that could be very serious to him, and I submit to Your Honor that it is a matter that takes a considerble amount of time to prepare for. I am not urging, because I am of record here, the illness of Mr. Goodwin, but I feel that we were employed.

(tr 15) because of him as well. Of course, if the Court sets this for trial and the jury is called, I

promise you that I will do everything I can to put in all the evidence that this Court would need to properly try it.

THE COURT: I can only repeat, the court is not disposed to grant the motion for continuance at this time.

MR. SPILLERS: I do hope that the Court will not take this matter that Mr. Tinker urged—he did report that he couldn't possibly be ready for trial, and he did considerable amount of work, making trips to two or three different states to gather information, and that is helpful, but we haven't seen those people that he talked to, and he didn't, by any means, get to see them all, and he couldn't be ready for trial.

THE COURT: His statement to me was that he couldn't even make up his mind whether he wanted to represent this man by today.

MR. SPILLERS: I think that's correct, also, but we didn't take that as a ground.

THE COURT: No, neither did the court.

• • • •

(tr 15-0) MR. MORGAN: The Government objects to the motion, of course.

The Government, going back to the motion for a bill of particulars, feels that some of the matters in there are known to the defendant or he has

means of ascertaining the information. For example, he knew that Paul DeArdo was
(tr15-P) the plant manager of Lorentzen Hardware and that their home office was in Hoboken. They have several plants. I think I can prove that the defendant knew that. But there is nothing in the indictment that shows the position with the company of James A. Whitehead, and whether the Court would require me to make a formal bill of particulars to disclose that, if he's entitled to know it—he was the mechanic of the plant of the cars and trucks over there. As far as I know, that was his official capacity. I was under the impression that maybe Mr. Franken knew that, but apparently he does not.

• • • •

(tr 15-Q) THE COURT: The Government has now disclosed the relationship with the Lorentzen Company of DeArdo and Whitehead, who are both defendants in this case, who have entered their pleas of guilty, so you now have that information, Mr. Spillers.

MR. SPILLERS: I don't have the one very essential thing yet, Your Honor. I asked what the capacity was of this DeArdo, whether or not he had authority to make sales for his company.

THE COURT: Well, going on beyond that, you have also raised the question as to an individual by the name of
(tr 15-R) Fabian.

MR. SPILLERS: Yes, Your Honor.

THE COURT: Is there any objection on the part of the Government to disclosing his relationship with the company or his capacity?

MR. MORGAN: Not at all. Thomas Fabian was what they call a slitter man in the steel business. But this was not a concern that bought and sold steel, it was a manufacturing concern that made venetian blinds. They never sold any steel, particularly prime steel of this kind that I have been informed of. Even rejects they get from Weirton Steel Company, they send those back. But nobody in the Weirton plant of Lorentzen Hardware Manufacturing Company, as I understand it, had the authority to sell steel. They may have sold scrap, but not steel.

THE COURT: In other words, this was rolled steel that was for their use, for the use of Lorentzen Company, in the manufacturing of venetian blinds?

MR. MORGAN: That's right.

THE COURT: Does that answer your question, Mr. Spillers?

MR. SPILLERS: Yes sir. It's the position that they didn't sell steel, and nobody up there had authority to sell steel except scrap.

* * * *

(tr 15-T) THE COURT: * * * * The motion to dismiss the indictment will be overruled.

The motion of the defendant Franken for discovery and inspection will be overruled.

For the reasons stated earlier this morning the motion for a continuance will be overruled.

As to the motion for a bill of particulars, some of the information has been furnished here at the bar of the court, some of the information that seemed to be particularly important to defense counsel. Is it your desire, Mr. Spillers, that the information already furnished at the bar of the court be put in a formal bill of particulrs?

MR. SPILLERS: No, Your Honor, I wouldn't require that.

• • • •

(tr 16) AFTERNOON SESSION

* * * *

MR. GOODWIN: Your Honor please, since we met here this morning and argued our various motions in this case we have learned certain facts which we believe should be

(tr17) made of record to the Court and presented to Your Honor. Mr. Spillers mentioned this morning that my father, Russell Goodwin, was ill this morning and could not come in. Probably a little bit more should be said about that. I have discovered since noon today that he not only will not be in today, he will not be able to participate in this case at all if it is tried tomorrow. I talked with him by telephone after noon today. He has almost completely lost his voice and is feeling very badly. Mr. Franken came to our office first, as was told you this morning, last week—that was on Wednesday—and practically all the time that has been spent with Mr. Franken, the defendant, Mr. Russell Goodwin spent with him. He came in to our office and spent about six hours with my father last Wednesday, who went over his entire matters, and, frankly, he kept almost all this information in his own head. No one stayed in that conference except my father. He intended to try this case himself. Mr. Spillers didn't see him on that particular occasion. He was back in our office on Friday after all motions in this case had been prepared by Mr. Russell Goodwin. When he came in on Friday he talked with Mr. Spillers briefly. That was only about a matter

of forty-five minutes to an hour, at most. Therefore, Mr. Spillers and myself are not well acquainted with this case. • • •

THE COURT: Mr. Goodwin, I think this court would like to be as considerate as possible under all the circumstances of the case, but it occurs to me still that if there is any disadvantage resulting from this situation to Mr. Franken it is entirely his own fault and due to his own dereliction. To wait until three or four days before a trial date to go out to engage counsel is certainly inexcusable negligence in the opinion of this court. He would have had ample opportunity to talk to Mr. Goodwin and Mr. Spillers at length had he started earlier and if Mr. Spillers was to participate in the trial of the case he would have been fully advised as to everything in connection with the case—and I may say that in arguing the motions here this morning he displayed to this court a very intimate knowledge of all the facts and circumstances apparently surrounding it, seemed to have a good grasp of the case. I realize that Mr. Russell B. Goodwin is an experienced trial lawyer, but I realize also that so is Mr. Spillers, and Mr. Spillers has served as United States Attorney in this court. It cannot be said by anyone that he is incompetent or unable to try the case.

(tr 20) MR. GOODWIN: Your Honor please, I did not mean to infer that, and I certainly —

THE COURT: I realize you didn't and I'm not saying that you did. I don't want to be misunderstood in that particular.

MR. GOODWIN: I merely said that I think he was relying on Mr. Russell Goodwin's knowledge of the matter in the trial of the case and his investigation of it through Mr. Franken, which he is not going to have the benefit of.

THE COURT: He evidently learned a lot about the case from someone because he displayed that knowledge here this morning; and Mr. Spillers further said that if it was the disposition of the court to overrule the motion for a continuance he wanted to assure the court that he would be here and try the case as best he could.

• • • •

THE COURT: Yes, sir, I sincerely hope so too. Mr. Goodwin, I might say, in addition, that the court is

(tr 21) advised that the Government has a large number of witnesses in this case, that some of them come from quite a distance. It has been a matter of great expense to bring them here. The fact of the matter is it may be difficult at some time in the future to even get them back here, and that's the reason that the court feels that, having made the preparation, it is necessary to proceed with the trial.

MR. GOODWIN: I understand that, Your Honor. We are in the same position, Your Honor,

these transactions having gone on over a year, nine separate transactions, and our witnesses are also from a great distance and we wanted more time, for that reason, and —

THE COURT: The court would be inclined to give consideration to that fact during the trial of the case, Mr. Goodwin, and that is as far as both sides are concerned. If you haven't had the opportunity to confer with your witnesses that may be done, even at the cost of some delay or some recess or something of that kind that it may be necessary to have during the course of the trial.

MR. GOODWIN: Thank you very much.

EXCERPTS FROM TESTIMONY

PROCEEDINGS

(BEGINNING)

TUESDAY, JANUARY 22, 1957

• • • •

(tr 26) PAUL ALBERT DeA..DO

For the Government — Direct.

• • • •

(Reference is made to DeArdo's testimony as printed in Appellant's Appendix, pages 26 - 47, 96 - 99.)

• • • •

(tr 83) JAMES A. WHITEHEAD

For the Government—Direct.

• • • •

(Reference is made to Whitehead's testimony as printed in Appellant's Appendix, pages 74 - 95.)

• • • •

(tr 121) RICHARD B. RITCHASON

For the Government—Direct.

• • • •

By Mr. Morgan:

Q Your name is Richard B. Ritchason?

(tr 122) A Yes, sir.

• • • •

Q And what is your occupation?

A Terminal manager, dispatcher.

Q For what company, sir?

A The Aetna Freight Lines.

• • • •

(tr 125) Q How was that haulage engaged by your company by Mr. Franken? In other words, did he call you up? Was he there?

A He called me by telephone from Youngstown.

Q And then what happened? What did he say to you and what did you say to him?

A He asked me to pick up this steel at Lorentzen Hardware, showing Fred Franken as shipper, Weirton, West Virginia, and delivered to Sharonsteel Products, Farrell, Pennsylvania, freight collect.

Q And did he tell you a certain time to place the trucks there?

A After five in the evening.

they didn't want to be loading trucks while that paint line was running on account of dust.

• • • •

(tr 183) RALPH P. CARROCCE

For the Government - Direct.

By Mr. Morgan:

Q You are Ralph Carrocce?

A Yes, Sir.

• • • •

Q And what is your occupation?

A Truck driver.

Q How long have you been a truck driver?

A About twenty-two years.

Q And who do you drive for?

A A & A. Trucking right now.

Q And who did you drive for in May 1955?

A McCullough Transfer.

• • • •

(tr 184) I will hand you Government's Exhibit No. 12, and ask you if you have seen that before, if your name appears on it, and if that is the shipment for which you went to Lorentzen on the occasion you just testified concerning.

A Well, I filled in this eight steel coils, that weight, 845,869. That's what I delivered on, right here.

Q Was that the procedure you went through in making shipments for Fred Franken from Weirton to either Sharon or Farrell, or Pennsylvania or Chicago?

A Yes.

Q In each case?

A Yes, sir.

• • • •

(tr 132) Q Mr. Ritchason, did you prepare each one of these bills of lading?

A All but the Chicago bill of ladings. The boys went all way through to Chicago and our Chicago terminal manager prepared those.

Q All the way to Chicago, where they were prepared?

A Yes, that's right.

Q May I inquire whether it is customary for you in your official capacity as dispatcher for your company to prepare bills of lading?

A Only in a case of this kind.

Q What kind of a case is this?

A Where a man calls you and tells you to pick it up at a certain destination and take it someplace else; in other words, brokering.

(tr 133) Q Did he tell you when to pick it up?

A Yes, sir.

Q When?

A After five o'clock the same day he called me.

Q Did the drivers have anything in any of these cases, as far as you know, from the Lorentzen plant to show that they had title to the property on their truck, or that they had possession of it?

A All they had was weight slips.

Q Did that have "Lorentzen" on it?

A I don't believe.

Q Normally, when you do prepare bills of lading -- and I assume that you have before, is that right?

A That's right.

Q Do you receive some papers from the shippers?

A Yes, normally, yes.

Q What kind of papers do you receive, normally?

A Well, packing list.

Q A packing list.

A Yes, sir.

Q What is that?

A It shows what you have on your truck.

Q Why didn't you prepare these bills of lading before you sent your trucker to Lorentzen, Mr. Ritchason?

(tr 134) A Well, I didn't have the weights yet.

Q You had to wait until the driver got the weights from whoever gave them to him at Lorentzen before you could prepare the bills of lading?

A That's right.

Q Would you say this was a regular way to move freight by your company?

A No, it wasn't regular. Of course, at that time it was a normal procedure. We did it for several other customers.

Q You did it for several other customers?

A Yes, sir.

Q You mean you prepared bills of lading?

A Yes, sir.

Q But you always had packing lists when it came in, didn't you?

A Yes, sir.

Q And you didn't in any of these cases?

A No, sir.

• • • •

(tr 135) Q After the Aetna drivers which you had dispatched to the Lorentzen plant had returned with their cargo to Columbiana and you had made

out the bills of lading and they had moved their cargo on out to the ultimate consignee, as you testified yesterday, please state to the Court and jury how long thereafter the information as to the weights contained on those bills of lading was made known to the

(tr 136) defendant, Fred Franken.

A Well, Fred would call me on different occasions and find out; sometimes it would be a day, two days, possibly three days, later.

Q As to various shipments?

A Right.

Q Did he ever come by the terminal?

A I believe he did on a few occasions stop at the terminal and get the exact weights.

Q Did he ever sign any of these bills of lading, if you remember?

A Not to my knowledge, no, sir.

Q You never saw him sign any of these bills of lading in your presence?

A No, sir.

Q I don't believe you testified yesterday why you sent your dispatchers to the Lorentzen plant at Weirton, West Virginia, after working hours, or after five o'clock. Will you tell the Court and jury why you sent them at the late hours?

A I inquired to Mr. Franken why he didn't want the trucks until after five, and it seemed as though they had a paint line working there, and

Q And in accordance with that request what did you then do?

A I sent the trucks down there at the time he said.

• • • • •

(tr 126) Q He got the load?

A Yes, sir.

Q How do you know that?

A By my records. He didn't return the manifest telling me it wasn't picked up, so evidently he got the load.

Q What did he do with the load, if you know?

A Delivered it to Sharonsteel Products at Farrell, and then sent the bills in to our Warren office.

Q Did he have a bill of lading, if you know?

A Yes. Yes, sir.

Q Who gave him the bill of lading?

A I did.

Q When?

A When he come up through with the load.

Q He had the load from Lorentzen at Weirton when he came back through Columbiana, and you made out the bill of lading, is that correct?

A Yes, sir.

Q Where did you take this shipment?

A Sharon, Pennsylvania.

Q Where did you get your shipping orders? Where did this come from?

A This steel come from Wheeling—or Weirton, right across the river from Steubenville there.

Q You mean the City of Weirton?

(tr 185) A The city, yes, sir. And we went on into Youngstown and had bills made up there, then went on to Sharon, Pennsylvania, and delivered it the following day.

Q What were your instructions as to the time that you would pick this load up, if you remember?

A Well, all I was told was to go down and pick up this load, and they told me it was on the Ohio side, so we went down at this one steel mill, right down by the river, and asked if there was a load of steel for Franken—we asked for Fred Franken, see—we had a pick-up slip showing we were to pick up a load of steel there, and down by the river there you could see across the river, and they said, "You go right over across to that place there, this"—

Q Lorentzen?

A Yes. Well, they pointed out the building, so we went over there and picked up the steel.

Q What time of the day or night was this?

A If I'm not mistaken we was supposed to be there at nine o'clock.

Q In the morning or evening?

A Evening. And we got there about quarter till nine and there was nobody there to load up so we just waited, and about fifteen minutes later, if I'm not mistaken there was two fellows that showed up there that started to load us; so
(tr 186) we were there about an hour or an hour and a half and we went on to Youngstown.

Q You say all you had from your dispatcher was a pick-up order?

A Just a pick-up slip, yes, sir.

• • • •

(tr 188) Q Did you receive any shipping orders from the Lorentzen people after they loaded your trailer?

A No, sir.

Q Did you ask for it?

A Yes, sir. I asked for a shipping order and they said, "You don't need any," and I says, "Why not?" and he said, "You don't need any," so he says, "Get your bills in Youngstown," so I went on to Youngstown.

Q Was that regular or irregular, as far as you knew?

A I think it was irregular.

Q Did you ever pick up a shipment before without getting
(tr 189) shipping orders?

A Yes, sir, but I had got a tally sheet.

Q You got something from the mill that you got it from?

A Yes, sir, I did.

(tr 190) RALPH P. CARROCCE

For the Government—Cross.

• • • •

Q And you had some sort of a paper with you, some sort of an order, as to where to get it and how much it weighed, approximately, and so forth?

A All I had was a pick-up slip with a name on it—I can't recall the name right now—I think it was—but it had something to do with Franken.

Q You have said you don't know Mr. Franken at all, is that correct?

A No, sir, I have never seen the man.

Q Outside of instructions to pick this up at nine o'clock, did you get any other special instructions in this particular case?

A No, sir.

Q You say you have on various occasions before picked up loads such as this without any shipping orders, is that correct?

A Without a shipping order, but I got a tally sheet.

Q What is a tally sheet?

A A tally sheet is a—say you have eight coils, it has the weight of each coil.

Q In this particular case did they give you some kind of paper indicating the weight?

A No, sir.

Q How did you arrive at that weight in order to put it

(tr 191) on the order which you picked up in Youngstown?

A Well, all the fellow told me was how much weight there was. The weight was — if I'm not mistaken it was stenciled on every coil, and that's what—the fellow added it up and he just told me—didn't write anything down, he just said, "Your weight is," as I recall, "forty-five thousand and some odd pounds."

Q He merely gave you that information rather than giving you a tally sheet?

A Yes, sir. I asked for one and he says there wasn't any.

Q And on that particular steel the weight was still included on each one of the coils, is that right?

A Yes, Sir.

(tr 192) RALPH P. CARROCCE

For the Government—Redirect

By Mr. Morgan:

Q One further question. Did you sign for the shipment at Lorentzen?

THE WITNESS: Did I sign for it?

Q Did you sign anything?

A No, sir, I didn't sign anything.

MR. MORGAN: No further questions of this witness.

* * * *

(tr 199) SIDNEY BORENSTEIN

For the Government—Direct

By Mr. Morgan:

Q You are Sidney Borenstein?

A Yes, Sir.

* * * *

Q And what is your business, sir?

A Well, we buy and sell steel.

Q In what name, sir?

A Superior Steel Service

Q And who owns that business?

A My brother and myself.

* * * *

(tr 201) Q Do you know who hauled your freight from Weirton, West Virginia, to Chicago, Illinois?

A I know it was Aetna Freight Lines.

Q And, per arrangement, who paid for that transportation?

A We did.

Q You did?

A Yes, Sir.

Q So any payment that you made to Franken included only the payment for steel—

A (Interrupting) Yes, sir.

Q (Continuing)—and not also transportation?

A Correct

(tr 202) Q If you remember, Mr. Borenstein, how much did you pay per pound for the steel you bought from Fred Franken?

A We paid 7½ cents.

Q A pound?

A That's right.

Q Straight?

A That's right.

Q Will you tell the Court and jury, and refer to your notes, how many pounds of steel you purchased from Mr. Franken in these two shipments?

A In these particular shipment we purchased 78,995 in one lot and 45,550 in another during the month of August, 1955.

Q And how much did you pay Mr. Franken for these shipments?

A The first shipment cost $5,924.63, and the second shipment cost $3,416.25.

• • • •

(tr 232) RAYMOND H. JONES

For the Government—Direct

By Mr. Morgan:

Q You are Mr. Raymond Jones?

A Yes, Sir.

• • • •

Q And what is your occupation?

A I am the the general auditor of Sharon Steel Corporation.

Q And where is your office?

(tr 233) A Office is in Farrell, Pennsylvania.

• • • •

Q Has your company had any business transactions with Fred Franken?

A Yes, sir.

Q Did it have transactions between November of 1954 and August of 1955?

A Yes, sir.

Q If you know, how many transactions occurred during that period?

A Six.

• • • •

(tr 236) Q For these shipments, Mr. Jones, are you prepared to state to the Court and jury the total amount of steel shipped by Fred Franken to your company, and also what you paid for it?

A There were six shipments, 351,120 pounds, $19,175.00

• • • •

(tr 239) RAYMOND H. JONES

For the Government—Redirect.

By Mr. Morgan:

Q I have one further question. Do you know what the price per pound was for this steel paid by your company to Mr. Franken?

A Yes, the first shipment was four cents a pound. That was the narrow coils, wastersheets. The balance of it was .055. That's without the freight.

Q I was going to ask you, did your company pay the freight on each shipment?

A The company paid the freight.

Q The first was four cents a pound and the remaining shipments were .055?

A It averages out about .0546 a pound.

MR. MORGAN: Thank you very much. You may inquire.

MR. GOODWIN: No questions.

By the Court:

Q Mr. Jones, I would like to ask you one question before you leave, if you can tell me. The prices paid to Mr. Franken for these various shipments of steel, were those what you would consider the fair market value?

A Yes, sir.

Q They were?

A Yes, sir.

• • • •

(tr 240) WILLIAM C. STEWART

For the Government—Direct.

By Mr. Morgan:

Q Your name is William Stewart?

A Yes, sir.

• • • • •

Q Who are you employed by?

A Levelola Vincent.

Q Is that a Lorentzen Hardware Manufacturing Company affiliated company?

A Yes, sir.

(tr 241) Q And what is your official capacity?

A I am a salesman.

• • • •

Q Prior to your being a salesman with the company in Atlanta where were you located?

A I was a truck driver for the Lorentzen Hardware at Weirton.

Q In Weirton?

A Yes, sir.

Q Do you know Fred Franken, the defendant in this case?

A Yes, sir.

Q Have you ever seen him around the Lorentzen Hardware Manufacturing company in Weirton?

A I don't remember if I have or not.

Q Where have you seen him, sir?

A At his home in Youngstown.

Q What was your occasion for being in his home?

A I was sent up to his home to pick up an envelope.

Q Who by?

A Paul DeArdo.

• • • •

(tr 243) Q Tell the Court and jury just what happened.

A Well, evidently Paul had talked to him over the telephone and he told him he was sending me up, and I went to his home and he wrote out a check

for me, but then he took it to the bank, I went to the bank with him, and he cashed the check—I believe it was $1600.00—and he gave it to me in fifty-dollar bills — $1600.00, I believe that's what it was.

Q $1600.00?

A I am pretty sure it was.

Q And what were you to do with that money?

A Take it back to Mr. DeArdo.

Q And that was from Fred Franken?

A Yes, sir.

Q And did you upon any other occasion receive money from Fred Franken for Paul DeArdo?

A Yes, sir.

Q Oh, you did? When?

A I don't remember the date. I think it was late winter or spring after that Christmas.

Q Where did you receive the money then?

A I met him in Steubenville over by Haines Trucking

(tr 244) Company, in their lot where the trucks are parked in there.

Q How did you know to meet him there?

A Mr. DeArdo sent me over there to meet him.

Q And where did you meet him—in the trucking lot?

A There's a trucking lot there, yes, sir.

Q And was he there when you got there?

A Well, he was driving up and down the hill there and I saw him passing and I got out of my car where he could see me and when he saw me he stopped.

Q Fred Franken did?

A Yes, sir.

Q What kind of a car was he driving?

A It was a 1953 Pontiac, two-toned, brown and yellow, I think.

Q And did he give you money on that occasion?

A Yes, sir.

Q How did you get it?

A I believe it was in fifty-dollar bills again, just in cash.

Q Did he get out of his car and give it to you, or what happened?

A I think I got in his car with him. I'm not too sure about it, but I'm pretty sure I got in his car and he just handed me the money.

Q And what did you say the amount was, and the

(tr 245) denominations?

A I think it was fifty-dollar bills, and I'm not sure of the amount. It could have been anywhere from four to eight hundred dollars. It was several hundred dollars.

Q That was for Paul DeArdo?

A That was for Paul.

Q And did you take it to Paul?

A I gave it to Paul.

(tr 245) WILLIAM R. MANNING

For the Government—Direct.

By Mr. Morgan:

Q You are Mr. William Manning?

A Yes, sir.

• • • •

(tr 246) Q Where are you employed?

A Lorentzen Hardware, Weirton.

• • • •

(tr 247) Q What time of the year, and what year?

A Well I don't recall the exact time, but it was cold. The reason I say that, he had a top coat on the times that I talked to him. But I would say around—I'd say about '55, just before Paul left.

Q Just before Paul left?

A Yes, sir.

Q What, if anything, did you ever say to Mr. Franken?

A Well, there was times that I went out, I was told to tell him Mr. DeArdo wasn't around and that he may not be back for a couple of days.

Q How many times did you do that?

A I believe it was three.

Q And who told you to tell him that?

A Mr. DeArdo.

(tr 248) WILLIAM R. MANNING

For the Government—Cross.

• • • •

Q And where would he be when you would give that information?

A Usually in the garage or in the office.

Q Would he be in a poker game?

A No, I never—he never left the poker game. no.

Q He never left the poker game?

A Well, I mean, there was never a poker game in session when I had to tell someone that. (tr 249) A No. The reason I remember Mr. Franken is because I knew he was from not around here.

Q Where was he from?

A I don't know where he was from, but I knew he wasn't—didn't have no connection with our company.

Q He had no connection with your company?

A Not that I knew of.

Q You didn't know why he was there?

A No, sir, I wasn't told.

Q You were never told?

A No, sir.

Q And what time of the day—would this be at night that you carried those messages?

A No, sir.

(tr 250 Q During the business day?

A During the business day.

Q And that was while your boss, the superintendent, Mr. DeArdo, was actually there at the plant?

A Yes, sir.

• • • •

(tr 283) THE COURT: Well, gentlemen, if you have finished, I don't believe that we need to recount here all of the circumstances that have developed in the testimony of this case. There are, in the court's opinion, a number of others which have not been mentioned by either side, circumstances which might well be considered by a jury in the face of the testimony, or in the light of the testimony, that has already been introduced. You have the testimony of DeArdo, and the court very distinctly understood him to say, or at

(tr 284) least that was the court's impression of his testimony, that they were to split the proceeds

from these sales on a fifty-fifty basis, not the commissions but the proceeds from the sales. He has testified that he received from Mr. Franken in cash on various occasions, some of it paid to other parties to be relayed to DeArdo, between eight and nine thousand dollars which would conceivably be many, many times a half of the split of reasonable commissions on these sales. Even that would be a circumstance which would tend to charge this man with guilty knowledge in connection with that transaction, if property was being taken out of the plant of the Lorentzen Hardware Manufacturing Company and sold to these steel mills around over the country in a period of time, according to Mr. Brown's testimony, as I remember it, when steel was very tight, it was difficult to get that grade of steel. Here's a company who is in the manufacturing business buying steel for its own manufacturing purposes. Only on one occasion, according to the testimony, was any of the steel sold—what we would term rejects; the rest of it was prime steel, and for which Sharon was paying an average of something between five and five and a half cents, or a little over five cents a pound—some of it was sold in Chicago for something around seven and a half cents—but in a period

(tr 285) when steel was scarce, and taking it out of a manufacturing plant, a plant which would ordinarily not have been selling steel at all, all of those circumstances are circumstances which, in my opinion, the jury has a right to consider in connection with DeArdo's testimony.

So, in the court's opinion, as the case now stands, there would be sufficient justification for permitting the case to go to the jury, because no part of the Government's testimony is contradicted. So the motion will be overruled at this time.

• • • •

(tr 351) FRED FRANKEN

For the Appellant—Direct.

By Mr. Spillers:

• • • •

(tr 394) Q There is some testimony in this case by the Government about the prices that you paid and received for this prime steel, or steel that was not scrap or had not been worked in some manner, and I would ask you whether or not at my request you did make an effort to get trade papers or information to show what the price was during this period of time.

A Yes, I have written to the Metal Market last week and asked them if they would send me papers, any one at all, for part of the year—the latter part of the year of '54 and some of early '55—if they would. I have some of them here that they sent.

• • • •

(tr 407) MR. SPILLERS: Very well, if I am wrong in wanting to see that I will withdraw the motion as to that, but before this case went to trial, before a jury was selected, I did make a motion

for statements by one of the co-defendants here, Paul Albert DeArdo, and if that is a bad precedent, or if it's called a fishing expedition—I have no way of knowing what's in there. Apparently the Government does not wish to let me see any such statements made. I would like to merely request that if there are any there and it's improper for me to see them that the Court look at them.

MR. MORGAN: I haven't spoken to his request to see DeArdo's statement. He said that there were several statements. The Government has found one statement that was given, and it is a copy of a signed statement of the Government witness Paul DeArdo, and I have it here, if the Court desires to see it or if the Court orders that the Government furnish it to Mr. Spillers. I contemplate putting Mr. DeArdo back on the stand. I don't recall Mr. Spillers having made a motion for this statement before, except that there was some sort of a request to have any statements made by Whitehead and DeArdo. Of course, that's too general.

THE COURT: At an earlier day of the term, Mr. Spillers, there was a motion made for the production and inspection or the right to copy the signed statements of the defendants
(tr 408) Paul Albert DeArdo and James A. Whitehead. That motion was at that time refused. However, if the United States Attorney has no objection to your looking it over, I am sure the court has no objection.

MR. SPILLERS: Thank you.

MR. MORGAN: You want Whitehead's also now, Mr. Spillers?

MR. SPILLERS: Are you planning to—

MR. MORGAN (Interrupting): I plan to call him back, yes, sir.

MR. SPILLERS: Of course I want both of them, then, if they are going to be called back, and that will be, of course, at the time, over my objection since they have already been here and testified and been cross examined.

THE COURT: Are you ready to have the jury return, gentlemen?

MR. MORGAN: Yes, sir.

Mr. Morgan thereupon handed papers to Mr. Spillers.

• • • •

No. 723

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

FRED FRANKEN, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

C. LEE SPILLERS
THOMAS A. GOODWIN
800 Riley Law Building
Wheeling, West Virginia

LAWRENCE BLOOMENTHAL
808 Leader Building
Cleveland, Ohio

GILBERT S. BACHMANN
1311 Chapline Street
Wheeling, West Virginia

Attorneys for Petitioner

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision and Statutes Involved	3
Statement	3
Reasons for Granting the Writ	6
Conclusion	13
Appendix A—Opinion of Court of Appeals for the Fourth Circuit	1a
Appendix B—Judgment of Court of Appeals	4a
Appendix C—Order of Court of Appeals Denying Motion for Rehearing	5a
CONSTITUTIONAL PROVISION:	
Sixth Amendment to Constitution of the United States	2
STATUTES:	
Title 18 U.S.C. § 371	2
Title 18 U.S.C. § 2514	3
Title 18 U.S.C. § 2315	3

IN THE

Supreme Court of the United States

October Term, 1957

No.

FRED FRANKEN, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Fred Franken, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction entered by the United States District Court for the Northern District of West Virginia.

OPINION BELOW

The opinion of the Court of Appeals is reported in 248 F. 2d. 789, and is reprinted as Appendix A hereto. There was no opinion in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered October 18, 1957.

A petition for rehearing was filed within the prescribed period and was denied by the Court of Appeals without opinion on November 19, 1957. The denial of rehearing is reprinted as Appendix C hereto.

On December 4, 1957, the Court of Appeals recalled its mandate of November 26, 1957, and stayed further proceedings to December 19, 1957, to enable petitioner to apply for certiorari.

On December 11, 1957, Chief Justice Warren extended the time for filing this petition to January 18, 1958. Petitioner duly notified the Solicitor General of the United States of the extension.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Was petitioner deprived of his right to a fair trial and to the effective assistance of counsel by the refusal of the trial court to grant a continuance?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States provides in part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

Of importance also are the following quoted sections of Title 18.

TITLE 18, U.S.C.

"§ 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than

$10,000 or imprisoned not more than five years, or both . . .

"§ 2314. *Transportation of stolen goods, securities, monies, or articles used in counterfeiting.*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . ."

"§ 2315. *Sale or receipt of stolen goods securities, or monies.*

Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . ."

STATEMENT

Petitioner was convicted under 18 U.S.C. § 371 of conspiring with others to commit the offense of transporting and selling shipments of steel in interstate commerce knowing the same to have been stolen, in violation of 18 U.S.C. §§ 2314-2315.

Petitioner, age fifty-eight, a resident of Youngstown, Ohio, with a wife and five children and with but two years of high school education, was an independent steel broker engaged in the business of buying and selling steel in the tri-state area of West Virginia, Ohio

and Pennsylvania. In the fall of 1954 he stopped at the Lorentzen Hardware Mfg. Corp. at Weirton, West Virginia, and for the first time met Paul Albert DeArdo who introduced himself as plant manager. Through subsequent negotiations with DeArdo, petitioner purchased a number of truck loads of coil steel over a period of about one year which he resold to other steel manufacturing concerns for normal commissions. Following the general custom of independent steel brokers his purchases were always in cash. The steel was shipped by bona fide trucking concerns licensed as common carriers. Petitioner was never present when any of the steel was loaded and moved by the carriers from the Lorentzen Hardware plant. In handling the transactions DeArdo was occasionally assisted by the chief mechanic at Lorentzen Hardware, James A. Whitehead. After the company discovered shortages in its steel inventory DeArdo and Whitehead admitted selling the steel to petitioner and others and keeping the proceeds. Both DeArdo and Whitehead were jointly indicted with petitioner and entered pleas of guilty prior to petitioner's trial. They testified on behalf of the government and were sentenced subsequent to the trial. Petitioner readily acknowledgd the transactions but denied knowledge that the steel was stolen or that the proceeds were being wrongfully converted by DeArdo and Whitehead. Evidence of his guilty knowledge was entirely circumstantial. Another steel broker, Albert Green, indicted separately for purchasing steel from DeArdo under identical circumstances, was subsequently acquitted.

Petitioner was indicted at Wheeling, West Virginia, December 12, 1956, following an investigation by the government consuming more than one year. During

the investigation by the government, petitioner cooperated with agents of the F.B.I. and freely and voluntarily supplied the agents with all information as to purchases made, names of carriers which transported the steel, and names and addresses of consignees. He first learned of the indictment December 14th and immediately consulted his attorney, James M. Modarelli, of Youngstown, Ohio. On December 17th, Mr. Modarelli wrote the United States Attorney, Albert M. Morgan, at Fairmont, West Virginia, requesting an interview, Fairmont being about 200 miles from petitioner's home at Youngstown. By letter of December 19th, Mr. Morgan advised that such an interview could be arranged after the first of the year. The interview was held at Fairmont, West Virginia, January 4, 1957, following which petitioner retained Wesley R. Tinker, Jr., of Wheeling, West Virginia, as local counsel. Mr. Modarelli, not being a criminal lawyer, then withdrew from the case. Petitioner was arraigned at Wheeling on January 7th and pleaded not guilty. On January 10th, the United States Attorney advised petitioner that his case was set for trial January 21st. Three days later Mr. Tinker's father-in-law, Attorney Charles McCamic of Wheeling, died suddenly. Under the circumstances Mr. Tinker immediately attempted to obtain a continuance. Although not resisted by the government, the continuance was denied by the court. By reason of the death in his family and the refusal of the court to grant a continuance, Mr. Tinker withdrew as counsel. On January 16th, petitioner again traveled to Wheeling to retain the firm Goodwin, Spillers and Mead as local counsel, and conferred with the senior member, Russell B. Goodwin. Arrangements for representation were not completed with Mr. Goodwin until the following day, January 17th. Mr. Goodwin

immediately prepared and filed motions for a bill of particulars and for discovery and inspection which were later denied. On Sunday, January 20th, Mr. Goodwin was taken ill and confined to bed. The next day, January 21st, the day set for trial, the court was informed of these facts, including the unexpected illness of Mr. Goodwin. A renewed motion for continuance was denied and petitioner was put to trial represented by an associate member of the firm, C. Lee Spillers. Mr. Spillers was absent from the city when petitioner retained his firm and had spent scarcely two days over the weekend assisting Mr. Goodwin in preparation for trial. Conviction followed. Petitioner, a businessman of integrity and good reputation, was sentenced to three years imprisonment and fined $3,000.

REASONS FOR GRANTING THE WRIT

By Affirming the Action of the District Court in Refusing to Grant Petitioner's Counsel Sufficient Time in Which to Prepare for Trial, Where It Appears From the Record That Three Previous Attorneys Retained by Petitioner Were Unable to Represent Him Because of Illness or for Other Reasons Beyond Petitioner's Control, the Court of Appeals so Far Sanctioned a Departure by the District Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision. The Law of Continuances in Federal Criminal Practice Has Not Been, but Should be, Settled by This Court.

The only ground for seeking this writ is the unconscionable refusal of the trial court to permit petitioner the effective assistance of counsel. Petitioner is a businessman of good reputation who now stands convicted of a felony for the commission of which he continues to protest his innocence. The indictment did not involve a single act; it was a charge of conspiracy

to commit a series of violations over a period of time extending more than one year. Fourteen overt acts were alleged. Petitioner lived in Ohio and was indicted in West Virginia. The witnesses were scattered over the tri-state area of Ohio, West Virginia and Pennsylvania. The scene of the offense was many miles from the place of indictment. These circumstances alone would dictate the necessity of time for adequate preparation.

Petitioner is acutely aware of the burden he must meet if he is to demonstrate to the satisfaction of this Court that his right to a fair trial and to the effective assistance of counsel was prejudiced by the mere refusal of the trial court to grant him sufficient time in which to prepare his defense. It is universally recognized that a motion for continuance is addresed to the sound discretion of the court, the exercise of which will not be disturbed in the absence of a clear showing of abuse or of manifest injustice. Whether the refusal to grant a continuance constitutes an abuse of discretion can only be determined in light of the facts of the particular case. Merely relating the chronology of petitioner's endeavor to obtain counsel from the time of his indictment demonstrates the diligence with which he proceeded.

Petitioner was indicted December 12, 1956, and was arrested two days later. He immediately contacted his personal attorney in Youngstown who arranged a conference with the United States Attorney in Fairmont, West Virginia, after the first of the year. Since the conference resolved nothing, petitioner's attorney advised him to obtain local counsel and withdrew from the case. At this point more than three weeks had elapsed. Mr. Tinker was retained as local counsel on

January 7th, the date of arraignment. Mr. Tinker's investigation of the case and preparation for trial were cut short by the death of his father-in-law on January 13th. When the Court refused to grant a continuance under the circumstances Mr. Tinker withdrew as counsel less than one week prior to the January 21st trial date. It was January 17th, four days before trial, when Mr. Goodwin was retained. Mr. Goodwin took ill on January 20th and on the following day his associate, Mr. Spillers, was compelled to handle the case. The case required more time to try than Mr. Spillers had in preparation for trial. He saw petitioner for the first time two days before trial.

When Mr. Tinker was retained two weeks prior to the trial date he was fully aware of the limited time available to him for preparation. The subsequent death of his father-in-law, Attorney Charles McCamic, made it mandatory for him to seek a continuance. *Although the United States Attorney did not oppose Mr. Tinker's request for a continuance,* the court nevertheless summarily denied the motion, thereby compelling Mr. Tinker to withdraw, despite the fact there were other and older cases on the trial docket. Petitioner was at once confronted with a critical situation over which he had no control. He desperately sought assistance elsewhere and four days before trial retained Mr. Goodwin. Mr. Goodwin, a veteran trial lawyer, immediately directed his entire effort toward preparation. When he became ill the day before trial his associate, Mr. Spillers, had to take charge. Fully apprised of these facts, the court again refused a continuance, charging that petitioner's predicament was caused by his lack of diligence in retaining counsel! Again the government did not oppose the motion for continuance.

The court had previously indicated to government counsel that it was the court's desire to set the case for trial a week earlier, January 14th. Not until the United States Attorney represented to the court (unbeknown to petitioner) that "it would be only fair" to allow the defense further opportunity to prepare did the court finally set the case for the 21st. In rejecting the final plea for continuance the court accused petitioner of being very lax in his efforts to secure counsel; of sitting idly by and doing nothing in connection with the preparation of the defense; of being entirely at fault due to his own dereliction; and of being inexcusably negligent in not engaging counsel until three or four days before trial. In conclusion the court stated that the "reason" for proceeding without further delay was the large number of witnesses summoned from a distance at great expense to the government, some of whom might have difficulty in returning at a later date.

The question arises as to what else could have been accomplished for petitioner had additional time been available. Were the rights of petitioner substantially prejudiced? The very nature of the charge, conspiracy, denotes vast complication; and this was not conspiracy to commit a single act but conspiracy to commit a series of transgressions over a period of time of more than one year. The government had subpoenaed more than thirty witnesses, twenty-one of whom testified. None of them resided locally. Defense counsel did not have time to interview a single government witness in advance of trial although some of them were personally known to petitioner. The government consumed many months investigating the rec-

ords of companies involved, and securing the statements of witnesses, an equal right which was denied petitioner.

Counsel is fully conscious of the desirability and necessity for speedy disposal of pending cases. However, neither such desire nor necessity can be permitted to infringe upon the inherent right of an accused to defend himself. The government enjoys unlimited facilities for investigation. It can proceed at its leisure and indict at its convenience. But an innocent person need not anticipate prosecution. He has no reason to seek the aid of counsel until he has been charged with crime. If he wants a speedy trial, after indictment, he may demand it. Conversely, is he not entitled to a reasonable opportunity to procure counsel and to prepare his defense? The cost of defense is on the accused regardless of guilt or innocence and his financial resources are usually limited. Time is of essence not only to seek out competent counsel but to plan and prepare adequate defense. In cases resting on circumstantial evidence, such as this, the accused is frequently confronted with the task of proving affirmatively his own innocence if he is to dispel the inmuendo of guilt. Careful preparation is required. After he is put on notice, of course, he cannot sit on his hands. He must act promptly in his own interest.

Here, petitioner did just that. In the five weeks from indictment to trial he had four different lawyers. The first, Mr. Modarelli, was his personal attorney not versed in criminal law; the second, Mr. Tinker, was compelled to withdraw because of a death in his family; the third, Mr. Goodwin, was incapacitated by illness the day before trial; and the fourth, Mr. Spillers, had

to try the case virtually without preparation. These facts were fully disclosed to the trial court. Their merit must have been apparent to the United States Attorney who did not oppose the repeated requests for continuance, yet the court accused petitioner of dereliction and summarily rejected the motions. Petitioner was thereby deprived of his day in court and denied his right to the effective assistance of counsel. Guilt or innocence notwithstanding, petitioner was entitled to a reasonable opportunity to defend himself. This he did not have.

Why was the court so opposed to a continuance? What harm could possibly result from a reasonable postponement when there were other cases on the trial docket to occupy the time of the court and jury? The case was not one of great public concern nor did it involve an offense of atrocity. The government did not oppose a continuance and it was only through the voluntary intervention of the United States Attorney that the trial was set for January 21st rather than one week earlier. The court expressed vexation with what it termed lack of diligence on the part of petitioner. But the court also cited as a reason the "great expense" to the government in recalling witnesses from a distance in event of postponement—truly a minor economy in a major criminal trial. If any reason was required, none other was assigned. Could the court have been influenced by another factor—a common practice which cannot be too severely condemned? Petitioner's co-defendants pleaded guilty prior to trial. Their sentencing was held in abeyance pending petitioner's trial. Without their testimony the government had no case against petitioner. There is no suggestion that they were promised any reward

for testifying for the prosecution (in fact, DeArdo subsequently received the same penitentiary sentence as petitioner—three years). Yet the intense hope for leniency in return for cooperation by those whose liberty is at the complete mercy of the court cannot but influence their testimony. Thus the co-defendants were eager to assist the government in their fervent wish for reward. They had pleaded guilty and were entitled to be sentenced promptly. Had petitioner's trial been postponed would they have received their prompt sentences or would it have been necessary to delay their sentencing, too, to avoid transforming their cloak of friendliness into one of hostility? With sole discretion vested in the court, petitioner was caught in a situation from which he could not extricate himself.

The question of continuance is a major problem confronted by trial courts in nearly every criminal case. Yet it is a matter on which the Federal Rules of Criminal Procedure are silent. It is left to the discretion of the trial whose rulings are seldom disturbed. Apart from the merits of this case is it not time for this Court to lay down general limits within which the discretion may operate? Untold hours of court time are consumed in arguing motions for continuance, the denial of which is frequently cited as error on appeal and summarily disposed of by the appellate court. Defendants in civil cases are guaranteed specific times in which to answer or plead. Extensions of time are liberally granted ex parte if not by agreement of counsel. In important cases delays for months and even years are tolerated solely to permit the parties adequate time in which to prepare. Why must the defendant in a criminal case be contin-

ually at the mercy of the individual court or of an over-zealous prosecutor? Why is he not afforded the protection enjoyed by his civil counterpart? This is not an attempt to slow the administration of justice, rather it is a plea for this Court to take cognizance of a troublesome, reoccurring problem that should be circumscribed for the future conduct of criminal proceedings.

Counsel for petitioner have consciously avoided the common practice of citing other possible grounds of error, thereby endeavoring to emphasize the urgent necessity and desirability of reviewing the nebulous law of continuances in criminal cases. The issue is presented cleanly and precisely in trust that this Court will undertake the solution.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

C. LEE SPILLERS
THOMAS A. GOODWIN
LAWRENCE BLOOMENTHAL
GILBERT S. BACHMANN
Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7452

FRED FRANKEN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of West Virginia At Wheeling

Opinion

(Argued October 7, 1957 Decided October 18, 1957)

Before Parker, Chief Judge, and Soper and Haynsworth, Circuit Judges.

Lawrence R. Bloomenthal and C. Lee Spillers (Thomas A. Goodwin on brief) for Appellant, and Albert M. Morgan, United States Attorney, for Appellee.

Per Curiam:

This is an appeal in a criminal case in which appellant was convicted of conspiracy to transport goods in interstate commence knowing them to have been stolen. Error is claimed with respect to refusal to grant a continuance, with respect to alleged refusal to require counsel for the government to turn over to defense counsel a statement made by a government witness and in denying a motion for a directed verdict.

The granting of a continuance was a matter resting in the sound discretion of the trial judge and we cannot say that there was an abuse of the discretion. Continuance was asked because of their illness of local counsel who had been retained to represent appellant; but appellant, who had been indicted more than a month before the trial, was represented by other counsel, and the partner of the attorney who was ill appeared and conducted the trial in his

stead. As the attorney appearing in court was a trial lawyer of ability who had served as United States Attorney of the district, and as it does not appear that there was any failure to secure proofs desired by appellant or that appellant was prejudiced in any other way by the refusal of the continuance, we certainly would not be justified in awarding a new trial on that ground.

With respect to the alleged refusal of the court to require the statement of a government witness to the F. B. I. to be furnished to counsel for the defense, it appears that the United States Attorney furnished to defense counsel a copy of the statement of the witness and that defense counsel accepted it, and raised no question with regard thereto at the time. This, we think, was sufficient to meet the requirement of the rule announced in the case of Jencks v. United States 353 U.S. 657.

As to the sufficiency of the evidence, the rule is well settled that on a motion for a directed verdict the evidence must be considered in the light most favorable to the government; and, when the evidence here is so considered, there can be no real question as to its sufficiency. The appellant was charged with a conspiracy to purchase steel from the plant manager of a corporation, knowing that it was being stolen from the corporation by the plant manager. There was no question as to the purchase of the steel from the plant manager or as to its being delivered and paid for under highly suspicious circumstances. The whole defense rested upon appellant's denial of guilty knowledge, but this was established by direct evidence of the plant manager, DeArdo, and corroborating circumstances which pointed unmistakably to appellant's guilt. As said by the trial judge in denying the motion for directed verdict:

> "You have the testimony of DeArdo, and the court very distinctly understood him to say, or at least that was the court's impression of his testimony, that they

were to split the proceeds from these sales on a fifty-fifty basis, not the commissions but the proceeds from the sales. He has testified that he received from Mr. Franken in cash on various occasions, some of it paid to other parties to be relayed to DeArdo, between eight and nine thousand dollars, which would conceivably be many many times a half of the split of reasonable commissions on these sales. Even that would be a circumstance which would tend to charge this man with guilty knowledge in connection with that transaction, if property was being taken out of the plant of the Lorentzen Hardware Manufacturing Company and sold to these steel mills round over the country in a period of time, according to Mr. Brown's testimony as I remember it, when steel was very tight, it was difficult to get that grade of steel. Here's a company who is in the manufacturing business buying steel for its own manufacturing purposes. Only on one occasion, according to the testimony, was any of the steel sold what we would term rejects; the rest of it was prime steel, and for which Sharon was paying an average of something between five and five and a half cents, or little over five cents a pound—some of it was sold in Chicago for something around seven and a half cents—but in a period when steel was scarce, and taking it out of a manufacturing plant, a plant which would ordinarily not have been selling steel at all, all of these circumstances are circumstances which, in my opinion, the jury has a right to consider in connection with DeArdo's testimony."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7452

FRED FRANKEN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM the United States District Court for the Northern District of West Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

October 18, 1957

JOHN J. PARKER
Chief Judge, Fourth Circuit

APPENDIX C

Order

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7452

FRED FRANKEN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

This Court having at its October term, 1957, rendered its decision affirming the judgment of the said District Court appealed from in this cause, and the appellant having on November 15, 1957, filed a petition for a rehearing of the said cause, and the same having been fully considered:

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby, denied.

November 19, 1957.

JOHN J. PARKER
Chief Judge, Fourth Circuit

LIBRARY
SUPREME COURT, U. S.

No. 723

FILED
FEB 13 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRED FRANKEN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

RUFUS D. MCLEAN,
Acting Assistant Attorney General,

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Avery v. *Alabama*, 308 U.S. 444	6
Isaacs v. *United States*, 159 U.S. 487	6

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 723

FRED FRANKEN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. III 4-7) is reported at 248 F. 2d 789.

JURISDICTION

The judgment of the Court of Appeals (R. III 7) was entered on October 18, 1957. A petition for rehearing was denied on November 19, 1957. The petition for a writ of certiorari was filed on January 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's motion for a continuance.

STATEMENT

On December 12, 1956, petitioner was indicted in the United States District Court for the Northern District of West Virginia for conspiracy to transport goods in interstate commerce knowing them to have been stolen (R. I 3-13; R. II 5). He was found guilty by a jury after a trial beginning on January 21, 1957, and ending on January 25, 1957. He was sentenced to 3 years imprisonment and a fine of $3,000.00 (R. I 1, 2).

The conspiracy charged in the indictment was to transport steel in mill width coils stolen from a West Virginia manufacturing company and to sell it in Pennsylvania and Chicago (R. I 3-5). Of the fourteen overt acts charged, nine (Nos. 1, 3, 4, 5, 6, 7, 8, 10, 11) charged that on a specific day petitioner's co-defendants (one the plant manager) stole a specified amount of steel from the mill, that petitioner arranged with a named carrier for the transportation thereof, and that he sold the steel to a named company. As to the remaining five overt acts charged, two alleged payments by petitioner to the co-defendants (Nos. 2, 9); two alleged the total sales of stolen steel to each of two customers (Nos. 12 and 13); the first one alleged the total payments by petitioner to the plant manager and co-defendant (No. 14). Petitioner's co-defendants pleaded guilty and testified

against him. Petitioner, on his own behalf, admitted making the sales and introduced in evidence receipts for money paid by one of his co-defendants (R. I 99-128). He admitted that he previously made a statement to Government agents concerning the amount of the sales and the company to whom sold (R. I 128). His defense was that he did not know the steel had been stolen (see R. I 131-132, 139).

At the opening of trial on Monday, January 21, 1957, petitioner made a motion for a continuance which was denied (R. I 15-21, 25).

The circumstances, as revealed by petitioner's motion (R. I 13-21) and the statements made on oral argument (R. II 4-10), are as follows:

Petitioner learned of the indictment returned in West Virginia on December 12, 1956, at his home in Youngstown, Ohio, on December 14, 1956 (R. I 16). He contacted his local Youngstown lawyer who arranged for an interview with the United States Attorney on January 4, 1957 (R. I, 16-17). Thereafter, petitioner consulted a West Virginia lawyer, Wesley Tinker, Jr., and was in the process of negotiating with him when petitioner was arraigned and pleaded not guilty on January 7, 1957 (R. I 17). On January 9, petitioner was informed that the trial would take place on January 21, 1957 (R. I 17).

Shortly after January 9, according to the judge's statement, he was called by Mr. Tinker, and when the judge told Mr. Tinker there would be no postponement of the trial date, Mr. Tinker said he could not represent petitioner because he could not complete his investigation in that time (R. II 5). Petitioner's

motion states that Mr. Tinker advised petitioner that he could not represent petitioner by reason of a death in Mr. Tinker's family on January 13, 1957 (R. I 17). Petitioner's counsel, Mr. Spillers, said that on January 14 (the day following the death of Mr. Tinker's father-in-law) Mr. Tinker approached him and said that for a good many reasons he could not represent petitioner and asked if Mr. Spillers' firm would take the case. Mr. Tinker told them of the court's refusal to grant an adjournment and turned over the results of his investigation which Mr. Spillers characterized as "quite considerable" (R. II 4, 6; see also R. II 10). Petitioner conferred with his new attorneys on the 16th or 17th, and they worked on the case over the week-end[1] (R. II 4).

During the oral argument, the court pointed out that the indictment had been returned five weeks before trial, that petitioner "had been anything but diligent in undertaking to secure counsel and get this case ready for trial" (R. II 8), and that to "wait until three or four days before a trial date to go out to engage counsel is certainly inexcusable negligence in the opinion of this court" (R. II 15). The court also pointed out that Mr. Spillers had served as a United States Attorney and, in argument on other motions in the morning, had displayed an intimate knowledge of the facts (R. II 15). The judge stated that he had been advised that the Government had a large number of

[1] The senior partner in the firm, Mr. Goodwin, was ill on the day of the trial, but Mr. Spillers disclaimed this as a ground for continuance (R. II 9); although at the afternoon session Mr. Goodwin's son pressed the point (R. II 11).

witnesses, brought from some distance at considerable expense, and that it would be difficult to get them back (R. II 16).

The judge also stated that, as to both sides, if there had not been the opportunity to confer with witnesses "that may be done, even at the cost of some delay or some recess or something of that kind that it may be necessary to have during the course of the trial" (R. II 17). The record reveals no such request by petitioner's attorney during the trial.

ARGUMENT

The facts set forth in the Statement fully answer petitioner's contention that the trial court abused its discretion in denying the motion for a continuance. They show, not only that petitioner was lax in attempting to engage counsel, but that in the end he did have the effective assistance of counsel who was in fact well prepared.

Although petitioner learned of the indictment on December 14, it was not until January 4 that he made a move to retain local counsel. Despite that fact, it is clear that his case was actually in the process of preparation from then on. Mr. Spillers admitted that Mr. Tinker, who later withdrew, had made a "considerable" investigation, the results of which were turned over to Mr. Spillers' firm.

Nor was the case really as complicated as the attorneys, in pressing their motion for a continuance, endeavored to make it appear. The overt acts charged in the indictment were, for the most part, sales about

which petitioner had previously made statements, concerning which he kept records, and which in fact he did not deny.[2] The only really contested issue was petitioner's knowledge of the fact that the steel was stolen. In this connection, on which the price paid had some bearing, the record shows that petitioner's counsel had previously requested petitioner to obtain, and petitioner did obtain, copies of the trade paper which would reflect the price of steel in the period in question (R. I 136). t is significant that there was no request for the limited recess which the court indicated it would grant if necessary. The record supports the conclusion that Mr. Spillers, a former United States Attorney, was well prepared to try the case.

The action of a trial court upon a motion for a continuance is a matter within its discretion and not subject to appellate review unless it be shown very clearly that the discretion has been abused. *Isaacs* v. *United States*, 159 U.S. 487; *Avery* v. *Alabama*, 308 U.S. 444. There was no abuse of discretion here.

---

[2] The Government of course had to prove the sales and the transportation, so that a number of witnesses were called on this issue (see R. II 18-31), but this was not the vital issue in the case.

[3] In the argument on the motion for a continuance, counsel had said that a Mr. Johnson of the Follansbee Steel Company was necessary and that he had then been unable to get him (R. II 9). It appears, however, that Mr. Johnson did testify (R. I 135). In addition, although it does not appear in the record, the Government's brief in the Court of Appeals shows at page 16 that petitioner had the benefit of witnesses from Steubenville, Ohio (Mr. Levkovitz), and Buffalo, New York (Mr. Gleason).

As the court below stated (Pet. 2a), since "it does not appear that there was any failure to secure proofs desired by [petitioner] or that [petitioner] was prejudiced in any other way by the refusal of the continuance, we certainly would not be justified in awarding a new trial on that ground."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys.

FEBRUARY 1958.